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ABSTRACT

With marriage laws in a state of flux, it is difficult to give unqualified answers to many of the serious and important questions people ask about law and marriage. To a great extent, each state is sovereign in the laws affecting marriage. Courts are playing an active role in defining and changing the legal consequences of marriage and other relationships. The important issues and considerations that cut across the laws and court decisions of all states are the focus of this booklet. The information is presented in question/answer format. The six chapters and some of the topics they cover are as follows: (1) "Defining Marriage Legally"--getting married, common-law marriage, name changes, premarital contracts, invalid marriages, living together outside of marriage; (2) "The Financial Side"--property, debts, equal credit legislation, estate planning; (3) "Children"--abortion, reproduction and childbirth, paternity and support, adoption, abuse and neglect laws; (4) "Your Conduct Toward Each Other"--sexual relations, domestic violence; (5) "Breaking Apart"--separation, annulment, divorce, spousal support, custody, visitation, and (6) "When a Spouse Dies" --wills, if there is no will, and children and inheritance. The booklet concludes with a section on where to obtain for more help. (JB)

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You and the Law Series

YOUR LEGAL GUIDE TO MARRIAGE

and Other Relationships

American Bar Association
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Acknowledgments

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Introduction

A few generations ago, love and marriage, according to a popular song, went together "like a horse and carriage." The horse and carriage are long gone, and marriage and the laws governing it have changed as well.

With marriage laws in a state of flux, it is difficult to give unqualified answers to many of the serious and important questions people ask about law and marriage. The difficulty of giving simple answers is further complicated because laws governing marriage vary from state to state. To a great extent, each state is sovereign in the law affecting marriage. In addition, courts are playing an active role in defining and changing the legal consequences of marriage and other relationships.

Yet, there are important issues and considerations that cut across the laws and court decisions of all states, and these are the focus of this booklet. For information on specific questions, readers should contact a lawyer in their state. Many lawyers specialize in family law; others include family law matters, as well as wills and estates, as a large part of their general practice. The final section of this booklet, "Where to Go for More Help," discusses methods of finding a lawyer.

Defining Marriage Legally 1

Q. Legally, What is marriage?

A. In the English common-law tradition from which our legal doctrines and concepts have developed, the question "What is marriage?" had a short answer. "Marriage" was a personal relationship between a man and woman, arising out of a civil contract that was entered into, maintained, and dissolved by law.

This common-law definition still survives in the language of the laws in many states. Marriage is considered a contract based upon a voluntary private agreement by a man and a woman to become husband and wife. As soon as a couple marries, however, the marriage relationship itself is defined as a legal status with consequences—economic and personal obligations during and after marriage—that are set and controlled by society through laws and judicial interpretations of laws. As the United States Supreme Court said about marriage in an 1888 opinion, "[t]he relation once formed, the law steps in and holds the parties to various obligations and liabilities."

The definition of marriage as a private contract and as a legal status reflects the two faces of marriage in English tradition, first as a private bond between two individuals and second as an important social institution. Today, marriage continues to have both an essentially personal, private dimension and an important social dimension. However, as our society has become more complex, there is no longer a short or single answer to the question "What is marriage?"

Today, marriage is also increasingly recognized as:

- an economic partnership, within which spouses can choose from among

a variety of roles, ranging from both parties working and mutually supporting the family to husband supporting wife or wife supporting husband;
- a means of reinforcing intimate personal bonds and mutual support; and
- a structure for childrearing.

Still, definitions and perceptions continue to change. Our society does not agree on the extent to which husbands and wives can rewrite the traditional rules of marriage, whether before or during the marriage, and have their new rules enforced by the courts. The current push for women's equality has further changed our notions of marriage, and its legal framework. Thus, the answer to "What is marriage?" continues to evolve.

ELIGIBILITY

Q. Who can marry?

A. Generally speaking, any unmarried man and unmarried woman over the age of 18 who are not close relatives of one another can marry. Requirements relating to age, health and consanguinity (the degree of blood relationship) are set by the states. Some states also have laws prohibiting those related by affinity (marriage) from marrying each other. Although details vary state to state, marrying someone very closely related (a brother, sister, mother, father or first cousin) is illegal, since the relationship would be incestuous. No state allows an individual to marry someone of the same sex. Nor can a person marry if he or she already has a spouse. Doing so is called bigamy and is usually a crime.

BREAKING ENGAGEMENTS

Q. What if someone decides not to go through with a planned marriage?

A. He or she is probably legally obliged to return any gifts that were received "conditional on performance of the marriage." This includes engagement rings and other gifts one person gave the other on the assumption that they were to wed, as well as wedding presents and shower gifts. "Gifts of pursuit," those given while courting but before marriage was agreed upon, are not subject to return.

Years ago, a jilted would-be spouse had a right to sue for "breach of marriage promise." Many states have abolished this right; others have limited it to the point that recovery is almost impossible. Today it is very unlikely a "breach of marriage" suit would succeed because it is generally viewed as bad public policy to encourage people to enter marriages about which they have serious doubts.

GETTING MARRIED

Q. How does one get married?

A. The traditional way to get married is to obtain a license and to participate in a formal wedding ceremony. This creates what is called a

ceremonial marriage. In 37 states, it is the only way to become married. In the other 13 states, a couple may also be married by common law without a marriage ceremony (see page 12).

On the surface, marriage would appear to impose more legal obligations and complications on a couple than just living together (see page 17). Every relationship entered into with any expectation of permanence, however, creates some legal and moral obligations. Marriage entails no more legal complexities than other kinds of relationships if a couple foresees a lifetime relationship, a family, owning a home and caring for one another "in sickness and in health until death do you part."

Q. What does it take to get a license?

A. In general, one or both members of a couple apply for a marriage license from an appropriate state official. There may be a waiting period between applying for the license and receiving it. There also may be a waiting period between receipt of the license and getting married.

In some states couples must show evidence of rubella immunity or vaccination. One state—Illinois—has introduced an AIDS test requirement. In many states marriage applicants are required to take a blood test for venereal disease. (In some states, however, if the applicants declare that they have been living together as man and wife, the state has the authority to confer a license without requiring them to take a blood test.) A few states demand a general physical examination.

If either member of a couple is found to have a disease in a sexually transmittable form, he or she may be denied a license in certain states. Other states will authorize the marriage as long as the couple is informed that the test results indicate the presence of the disease.

Q. What kind of ceremony is necessary?

A. First a couple presents the marriage license to someone authorized to perform marriages in their state. Typically this person is a public official or member of the clergy. The couple then goes through either a civil or religious ceremony conducted according to the laws of the state. At minimum, they will have to say, before the authorized person and, sometimes, another witness, that they agree to marry one another. Typically, the rest of the ceremony is left to a couple to determine, although many religious ceremonies will include certain traditional rites.

Q. When does a couple actually become married?

A. In most jurisdictions a couple is married when the ceremony ends. It is commonly believed that a couple is not married until they have had sexual relations. In some jurisdictions the lack of consummation through sexual relations may make the marriage subject to annulment (see page 54), but in most states this does not affect the validity of the marriage. All states, however, require that the marriage license or certificate be

recorded. That record then provides objective evidence that the marriage took place.

COMMON-LAW MARRIAGE

Q. What is common-law marriage?

A. Thirteen states and the District of Columbia recognize common-law marriage as an informal, consensual alternative to ceremonial marriage. In those places, a marriage is valid when a man and woman who are eligible to marry agree to be married and live together in such a way as to be regarded as husband and wife.

If two people enter into a common-law marriage in a location that recognizes common-law marriage, their marriage is valid anywhere. The marriage carries the same rights and responsibilities as those of a ceremonial marriage and is equally binding. There is, however, no such thing as informal, common-law divorce. Once a couple has entered a valid common-law marriage, they must obtain a formal divorce to terminate the relationship. There is a common misconception that common-law marriage requires seven years of living together. In fact, a couple probably becomes married from the moment they live as though they are married and hold themselves out as husband and wife.

Because of the lack of a formal record and procedure, however, common-law marriages often lead to serious uncertainties and misunderstandings. Repute and holding out as husband and wife are often required to prove a common-law marriage. It is relatively easy for one party to argue that the marriage never really happened, making the protections of common-law marriage much less certain than formal marriage.

NAME CHANGES

Q. Does a woman's surname change when she gets married?

A. Not unless she wants it to change. The informal, common-law method for changing a name without a formal judicial process requires simply that a woman use the new name consistently and nonfraudulently; it then becomes her name "by usage and repute." It was formerly believed that women's surnames changed automatically when they married, but now it is recognized that women choose to change their names by the common-law method of "usage and repute."

A woman who marries but wishes to keep the name she was using before marriage should simply continue using that name. In most states, a woman who wants to use her husband's last name or a name combining his and her names, or a man who wants to use his wife's last name or a name combining her and his names, need only start and continue to use the chosen name. If either husband or wife does change names, he or she should change the name on his or her driver's license, employment records, bank

accounts, credit cards, and other pieces of identification, and otherwise notify all interested persons.

In most states, a person who wants to change his or her name at a time other than at marriage—as when a woman used her husband's surname when she married, for example, but now wants to resume her former name or change to a new name—can do so by the common-law method of consistent, nonfraudulent use. In a few states a court hearing may be required. Such a formal court process is available in all states and may be preferred as a faster and more precise alternative.

PREMARITAL CONTRACTS

Q. Can a couple define the terms of their marriage?

A. Formal agreements entered into by couples before they marry are called premarital, prenuptial, or antenuptial contracts. At one time courts were unwilling to enforce any such agreement intended to control obligations during marriage or in the event of divorce, even though courts in many states sometimes enforced agreements that limited or eliminated inheritance claims when a marriage ended by the death of one spouse. Premarital contracts governing disposition of property at death gradually became an accepted means of protecting the interests of children of first marriages when a parent entered into a second marriage. Today, it is fairly well established that courts will enforce certain kinds of provisions of premarital contracts dealing with divorce.

A premarital agreement (or any other legal document) should be read carefully before signing and should not be signed without a thorough understanding of the terms of the contract. The contract should be taken to an attorney or financial expert before being signed. No one should be pressured to sign one of these contracts. Premarital agreements executed in the absence of force, fraud, or duress, are contracts enforceable in the courts. Remember, those who sign them will be bound by them. Someone considering a premarital agreement has the right to have it examined by an expert before signing, and the right to consider it carefully, away from any kind of pressure.

Q. What are the advantages of a premarital agreement?

A. Premarital agreements can help couples anticipate areas of possible disagreement and help them settle these problems in advance. Even if some provisions of these agreements are not legally enforceable, the process of working out the agreement can improve a couple's communications and help clarify their expectations of one another. Premarital provisions can be useful in making special inheritance provisions in second marriages, where either or both of the parties have children from a prior marriage. When combined with other estate planning, such contracts can help ensure

that children from a previous marriage will receive the bulk of their parent's estate.

Some people argue that premarital agreements may make a divorce less traumatic for all concerned by smoothing the negotiations surrounding divorce settlements. Since judges are given considerable discretion in allocating property and determining support obligations when divorcing parties cannot agree, premarital agreements can reduce certain financial uncertainties that might otherwise occur at the time of divorce.

Q. What are the disadvantages of a premarital agreement?

A. Some people suggest that, in the event of a divorce, a typical prenuptial agreement may do a disservice to one of the parties. They argue that, in the absence of a prenuptial agreement, a judge is likely to award one party a better settlement than he or she would have been likely to negotiate in a prenuptial agreement. When they are beginning their life together, people may not be able to think realistically about financial consequences if their marriage should end in divorce many years later. Even if they are realistic, there may be unexpected events and changes in the intervening years.

Some people find premarital agreements inconsistent with the notion that two people who are about to be married should trust one another. Finally, the enforceability of premarital agreements is uncertain, due to state laws that vary and circumstances that may be much different years after the agreements were made.

Q. What kinds of premarital contracts are enforceable?

A. Rules differ among states. Generally, however, premarital agreements controlling the disposition of property in the event of divorce are enforceable if the bargaining process was fair and if the terms of the provisions were conscionable when they were agreed upon. By "conscionable" it is meant that the terms were fair and reasonable. Some states also require that the terms of a property agreement not be unconscionable at the time it is to be enforced. For example, an agreement that was fair and reasonable when it was signed may be quite unfair five years later when the couple's financial situation has changed dramatically. Some states, however, will enforce property agreements if the process was fair and the terms were fair when agreed to without regard to the situation at the time of enforcement.

Twenty years ago, no state would enforce a premarital agreement that limited or waived spousal support in the event of divorce. Now many states will enforce such provisions, although some still treat spousal support as beyond the power of spouses to control. Courts willing to enforce provisions waiving support may require more than a fair bargaining process and terms that were fair at the time agreed to. They may require terms that are fair when the marriage is dissolving. Furthermore, even in states most

willing to enforce premarital agreements, courts may refuse to enforce provisions waiving support if enforcement would make a spouse eligible for welfare.

Premarital agreements regarding child custody are not enforceable. Parents cannot preempt a court's power to make an independent determination of the best interest of the child at the time the issue arises. Similarly, an agreement about child support is not enforceable if it adversely affects a child's right to parental support; it might be enforceable if it calls for more rather than less financial support than a court would award in the absence of an agreement.

Provisions regarding financial arrangements during the marriage may be indirectly enforceable, in the sense that they may determine the ownership of particular funds or assets at the time of divorce. However, provisions regarding personal conduct and responsibilities during the marriage, such as who will wash the dishes and who will mow the lawn, are generally advisory only and unenforceable by a court.

Q. What determines whether the bargaining process was fair?

A. Courts look for assurances that the premarital agreement was voluntary and not made under duress. Some courts insist on fair disclosure to each party of the other's assets. Timing also may be significant. Though courts have often enforced agreements made very shortly before the wedding, it may be preferable to have the documents signed well in advance, so that there is less reason to infer that one party was pressured into signing. A few states require that each party have a lawyer. Even when that is not required, the process is more likely to be upheld if each party was represented by a lawyer.

OBLIGATIONS OF MARRIAGE

Q. What are husbands' and wives' obligations?

A. Throughout its history, marriage has been regarded as a "two-way street," and the exchange between the spouses was assumed to be that the husband was obliged to provide financial support for his wife, and in return the wife was obliged to maintain the home.

As society changes, the law is evolving. Today, there are marriages in which the wife is the breadwinner and the husband is the homemaker. Even more common today are marriages in which both spouses work to support the family. States are now more sensitive to gender (male/female) stereotypes and critical of gender-specific laws. They have changed their laws in one way or another to make legal enforcement of gender-based roles in marriage obsolete. Of course, these changes do not prevent couples who wish to undertake traditional marital roles from doing so.

Whatever moral obligations one spouse may have toward the other, his or her legally enforceable obligations are relatively few. Each owes the other

financial support. As noted above, both spouses may work and contribute to the family's finances. If a couple has agreed, however, that one will maintain the home and raise the children in return for the other's financial support, the latter must fulfill that financial obligation. Or if one spouse becomes disabled, the other must provide support to the extent possible.

Q. How much financial support do spouses owe each other?
A. Historically, husbands were legally responsible for the support of their wives, and judges allowed husbands wide discretion in deciding what standard of living they would establish for their families. Today, there is a duty of mutual support. If one spouse is in need, the other is required to supply him or her with such necessities as food, shelter, and medical and dental care. The spouse providing the support, whether husband or wife, has some discretion to determine the extent of the support.

Q. Are both spouses legally obliged to work?
A. No. Although in many marriages both partners do work outside the home, the courts recognize that some couples prefer the traditional arrangement, in which one spouse earns income and the other maintains the home. The law no longer assumes, however, that the spouse who works outside the home will be male and the spouse who works at home will be female. The spouse who is dependent on the other for financial support is now generally referred to as the "dependent spouse," and may be male or female. In the event of divorce, courts increasingly expect the dependent spouse to become self-supporting within a few years, unless the marriage was lengthy or the dependent spouse disabled. A disabled dependent spouse may be entitled to support for life or until the disability ends.

Q. What recourse does the dependent spouse have if the "breadwinner" stops support?
A. When husbands were legally responsible for the support of their wives, the courts allowed a wife to use her husband's credit to buy "necessaries," which were defined differently by different courts but usually referred to basic food, clothing, shelter and medical care. The courts would then require the husband to pay the bills. Now that support obligations are no longer gender-based, this limited right to use a spouse's credit, in states where the right still exists, is available to either dependent spouse, male or female.

INVALID MARRIAGES

Q. What if someone thinks he or she is validly married but it turns out otherwise?
A. Sometimes one or both persons who live together for a long time believe themselves to be married but it turns out they are not. One of them

may have concealed a former marriage from the other, for example, or both may mistakenly believe that an earlier marriage had been terminated by a divorce or by the death of a spouse. In a handful of states, the putative spouse doctrine may provide some protection for persons with a good faith belief that they are married. A putative spouse may acquire the benefits and entitlements of a legal spouse if, when the marrige was entered into, he or she did not have information making it apparent that there was an impediment to the marriage or that would have made a reasonable person aware that there was an impediment.

Some states that recognize the putative spouse doctrine apply it only when the couple had a ceremonial marriage, while others extend it to persons mistakenly believing themselves married by common law. In states that do not recognize the putative spouse doctrine, persons who live together mistakenly believing themselves to be married have the same legal status as other couples who live together without marriage (see next section).

Often persons who thought themselves married discover the marriage's invalidity only when the marriage is dissolving and the spouse seeking a divorce learns that the couple was never truly married. On the other hand, sometimes after a long but technically "invalid" marriage, a court may simply find the marriage valid. If a marriage is considered valid by a state and not void, a divorce would be necessary to dissolve it.

Q. What other legal doctrines may be available to those whose marriage is invalid?

A. Aside from the putative spouse doctrine, sometimes a relationship based on an "invalid" marriage is treated as a marriage. For example, if one party deceived the other into mistakenly thinking they were married, a court may refuse to allow the deceiver to assert the marriage's invalidity. In legal terminology, the deceiver is "estopped" from denying the marriage's existence. In other situations, if the relationship is lengthy, a court may find "laches" (long delay) prevents even a party who was originally innocent concerning the invalidity from asserting it long after learning of the invalidity.

Another doctrine which sometimes results in treating parties to an "invalid" marriage as being married is the presumption of the validity of the latest marriage. Under this doctrine, if a party has been married twice the law assumes that the second marriage was contracted after a divorce or annulment dissolved the first. Thus, the party who wants to claim that a second marriage was invalid as bigamous must *prove* there was no dissolution of the first marriage. Sometimes this is a very difficult task, and marriages which are in fact bigamous are treated as valid.

LIVING TOGETHER OUTSIDE OF MARRIAGE

Q. What if a couple lives together and chooses not to marry?

A. Many people regard unwed cohabitation as a legitimate alternative to

marriage. Increasingly, people are treating such arrangements as relationships that can be akin to marriage in the seriousness and commitment of the parties. This growing phenomenon is having profound effects on society and on the institution of marriage, and the law is evolving in response to it. As unwed cohabitation gains widespread acceptance, some states are beginning to assert that living together can impose legal obligations on the "nonmarital partners." The laws governing nonmarital partners, like those governing married partners, are in flux.

Q. Is it illegal for unmarried couples to live together?
A. Strictly speaking, it is illegal in a few states for an unmarried couple to live together. However, even in those states where laws against cohabitation are on the books, an unwed couple can cohabit without much fear of arrest as long as their behavior isn't "open and notorious" or "lewd and lascivious." Most states have decriminalized unwed cohabitation.

Q. What legal difficulties do adults who live together encounter?
A. Even in states that have decriminalized unwed cohabitation, adults who live together may find that insurance is more expensive or difficult to come by, that credit is more difficult to obtain, and that employment or living quarters are more difficult to find. In some states, cohabiting adults may risk their right to retain custody of children from a previous marriage or to receive alimony or maintenance payments from an ex-spouse. If a cohabiting adult requires emergency medical treatment, he or she may find that a hospital will not consider the other as "next of kin" who can give consent for treatment. In addition, health insurance benefits from an employer will generally cover the spouse of an employee, but will rarely cover a nonmarital partner. The general situation of nonmarital partners varies considerably from community to community.

Q. What are the obligations of live-in couples to one another?
A. Although the law in this area is still evolving, it is possible to make certain general comments about the obligations nonmarital partners may have toward one another under the law.

Most states permit nonmarital partners to have contractual obligations toward one another. Some states, such as Illinois, will not enforce any nonbusiness contract between nonmarital partners. Where contracts are allowed, most states will enforce only "express" contracts.

In an express contract, the parties state the terms of their agreement specifically, either orally or in writing. Laws differ from state to state as to what makes a valid, enforceable contract. An express contract can be created without lawyers and without a written document, although many states insist that the contract be in writing. The only way to be reasonably sure that an express contract will hold up in court is to negotiate a written contract with the help of independent legal counsel.

"Implied" nonmarital contracts are recognized in only a few states. In an implied contract, a contract exists even though the parties never spelled out specific terms. The courts may find that a contract was implied if the behavior of the parties shows that they intended to make a contract. For example: Jane Doe and John Smith decide to live together. She leaves a good job in order to care for their home. He pursues a lucrative career. After they live together fifteen years, he marries someone else. A court may find that Jane and John had an implied contract to share their resources, implied by such behavior as her leaving her job to care for the house, his financial support of her, and possibly by other factors such as a joint bank account, jointly owned property, or other pooling of resources. As a result, the court may find that John owes Jane some portion of the money he earned while they lived together.

In addition, nonmarital partners may have obligations toward one another incurred under theories of equity. Equity is a very old body of rules which permits the courts to settle disputes between people according to general notions of fairness. This is a very complex area, on which the advice of a lawyer should be sought.

Q. How can a cohabiting couple avoid such financial obligations to one another?

A. A couple is probably reasonably safe if they take the following precautions: they should not make each other any promises relating to money or property, either orally or in writing; they should have separate incomes and keep money in separate accounts; they should keep property separate—hold title separately and pay for debts incurred separately. If a couple does not want to live like that—if, for example, the couple wants to share ownership of property acquired during the relationship—the couple probably should have a written contract explicitly detailing whatever financial obligations the parties intend to undertake and explicitly disclaiming others.

The Financial Side 2

PROPERTY

Q. Who owns what in a marriage?

A. Property owned by each spouse prior to their marriage is called "separate property." Following marriage, each spouse normally retains control over his or her separate property. Both the husband and the wife have the right to buy, sell, and borrow money on their "separate property." A person's separate property includes not only personal effects or other property which he or she has brought into the marriage, but also the profits, rents, or other income derived from that property (though, in some community property jurisdictions—see page 22—revenues from separate property can become marital property).

Property that is brought into the marriage may not always remain separate property, nor is it necessarily free from claims by the other spouse or creditors. It is possible to commingle or combine one's separate property with the marriage property to such an extent that the separate property loses its identity and merges into the marital property. For example, if the rents from property that one spouse owns go into the couple's joint checking account, and they pay for the property's upkeep out of the account, the property may be part of their joint property. Once one's separate property becomes merged, one's spouse may have a legitimate claim to it.

It is likewise possible for one spouse to use marital assets or work to improve separate property, and thereby give the other spouse interest in that separate property. For example, if a couple uses their joint checking

account to fix up a vacation house that was left to one of them, in some jurisdictions both spouses may be able to claim ownership of the house, though in other jurisdictions the spouse who did not inherit the property may not get an interest in it but may be able to get back his or her portion of the joint funds spent on the property.

A person can also voluntarily relinquish control and ownership of separate property. Placing money in a jointly held bank account may create the presumption that the money belongs to both parties. One spouse would then be able to withdraw that money without the other's consent. The spouse's creditors may be able to reach this money, too. Similarly, if separate money is used to pay family expenses, the law considers that money to have been a "gift" to the family. The spouse contributing the money is not entitled to be repaid without some written agreement or other strong evidence showing that the expenditure was a loan rather than a gift.

Finally, in the event of a divorce, courts in some states have latitude in disposing of either spouse's separate property. If the couple's circumstances require such action, the courts in these states may award one spouse's separate property to the other as part of the division of marital property, or to provide support for the minor children and other spouse.

Q. Can a couple own property together?

A. Certainly. In community property states, this is done automatically. The community property system prevails in eight states. These jurisdictions—Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington, as well as Puerto Rico—consider income earned and property acquired during a marriage to have been brought into the marriage through the joint effort of both partners. In addition, Wisconsin, because of legislation that took effect in 1986, treats income earned and property acquired during marriage as jointly owned. In these nine states, and in Puerto Rico, even if one spouse accounted for the couple's entire income, both will share the income and property acquired equally—50-50. In the remaining states, spouses are most likely to own property together under one of the following three forms of co-ownership:

Joint Tenancy: Joint tenancy exists when two people own property that includes a right of survivorship. In joint tenancy, each party has an interest in the whole property. If one dies, the other continues to hold his or her interest in the whole property, which becomes a sole interest by virtue of the other's death. Since the survivor is continuing his or her prior interest in the property, the property is not probated and is unaffected by the presence or absence of a will. Joint tenancy is not restricted to husbands and wives. Any two people may own property as joint tenants.

A joint tenant can go to court to have the property "partitioned"—that is, divided. After a partition, the property may be held as tenants in common (see below), or separately, by assigning portions to each in his or her

own name. A creditor can reach the debtor's interest in joint tenancy property.

Tenancy by the Entirety: Tenancy by the entirety is similar to a joint tenancy in that it includes a right of survivorship. Tenancy by the entirety is available only in some states and is a form of ownership restricted to husbands and wives.

Tenancy by the entirety has special features not available to joint tenants. In a tenancy by the entirety, creditors cannot "partition" the property without both spouses' consent. Generally each party in tenancy by the entirety has veto power over whether the property can be sold. Divorce or death can result in partition of the property.

Tenancy in Common: Tenancy in common exists whenever two or more people own property in common. Tenancy in common is not restricted to husbands and wives. It is probably the most frequently encountered form of co-ownership of property. In a tenancy in common, each person has control over his or her share of the property. This form of co-ownership also allows the tenants to own unequal shares, although this is extremely rare.

There is no right of survivorship in a tenancy in common. When one spouse dies, his or her share passes to the heirs, either by will or intestate succession (without a will).

The rules about establishing the different "tenancies" vary from state to state. Some forms of co-ownership are quite technical in their creation and must be entered into in a precise manner; otherwise, they may be defective and not enforceable in the courts.

DEBTS

Q. Can a spouse be responsible for the debts the other spouse brought into the marriage?

A. In community property states, a spouse may under special cicumstances become responsible for the other spouse's premarital debts. Likewise, the property which the husband and wife earn after marriage may be applied toward payment of a spouse's premarital debts. If someone is planning to marry a person who has substantial debt, both parties should explore the options of either discharging these debts through premarital bankruptcy, or employing other legal procedures to protect separate property from the claims of the future spouse's creditors.

Q. Do husband and wife have the right to incur debts for one another?

A. Yes. In community property states, debts incurred during marriage are the responsibility of both spouses. Generally speaking, however, in most states just being married does not give one spouse the right to load the other with debts. If one spouse incurs a debt, even under the other spouse's name, the other spouse is not automatically obligated to pay it. However, as with almost everything, there are exceptions.

For instance, to the extent one spouse receives the benefit from property or services purchased by the other spouse, he or she may be obligated to pay the reasonable value of that benefit or service. If one spouse bought the car but both use it, both may be liable for car payments. Another important exception involves "necessaries." Necessaries are food, clothing, shelter, or medical care vital to one's health, safety and welfare, depending on the circumstances of the parties. The standard of living of the couple may determine "necessaries." In a case involving wealthy people, a mink coat was held to be a "necessary." As noted earlier (see pages 15-16), marriage brings with it an obligation to support the other spouse. If that support is not forthcoming, the nonsupported spouse can, in many instances, contract for the necessaries of life, and his or her spouse will be obligated to pay for these.

Additionally, one's spouse can incur debts in the other's name. For example, if one spouse gives the other a credit card in his or her name, the spouse must pay the bills incurred on that credit card. If one spouse establishes a pattern of paying the other's bills with a particular merchant, he or she may be obliged to go on paying those bills. Moreover, if one spouse's property has been used as security for the other's debt, that property can be taken by the creditor in the event of default. Finally, if spouses share any credit account, both are responsible for the full debt on that account.

Q. How can one end responsibility for a spouse's debts?

A. It is difficult, especially in community property states, though in general even there a spouse can do some things to limit open-ended liability. In some situations in community property states, nothing short of divorce or a court order will relieve a spouse of this obligation for debts contracted prior to the date of separation. The date of separation is also important because after that date a spouse may no longer be liable for the necessaries of life for the other spouse. (To establish the date, it is advisable to have a court order of separation. See page 54.)

In other states, one spouse may be able to end responsibility for future debts incurred by the other spouse. This often requires giving notice to the merchants or credit card companies with whom the second spouse has dealt in the first spouse's name. This notification procedure is not always effective, however.

EQUAL CREDIT LEGISLATION

Q. What is the Equal Credit Opportunity Act?

A. Until recently, a married woman often found that she had "lost" her separate credit rating. If her husband died or if they were later divorced, she often discovered that she and her husband had one credit rating, and that rating belonged to her husband. This loss of credit could have disastrous results. However, a federal law has largely remedied this problem.

Known as the Equal Credit Opportunity Act (ECOA), the law prohibits discrimination because of race, color, religion, national origin, sex, age or marital status when one applies for credit.

Under the ECOA, a spouse may not be discouraged from applying for a loan, refused a loan if otherwise qualified, or lent money on different terms because of marital status. A creditor is not allowed to ask about marital status in an application for an individual, unsecured account (such as a bank credit card or overdraft checking account) unless the applicant lives in a community property state, or is relying on property located in a community property state to support his or her credit application.

Q. How can a married woman establish a separate credit rating?
A. A married woman should maintain a line of credit in a name not her husband's. This can be her first name and her husband's surname—"Mrs. Mary Doe"—or any other name except her husband's first name and surname—"Mrs. John Doe." As long as she maintains credit "in her name," she need not worry that her credit rating will lapse.

Q. Can a woman be refused credit because she plans to have children?
A. Under the ECOA, a woman cannot be asked about birth control practices or childbearing plans. A creditor may not discount her income in figuring her eligibility for a loan on the assumption that since she is married she will have children. On the other hand, a creditor may lawfully ask about children she already has and use that information to estimate her expenses.

Q. Does a married woman have to use courtesy titles such as "Mrs." or "Ms." on her charge cards or other credit documents?
A. No. Under the ECOA, such titles are unnecessary. Women—married or not—do not have to choose a courtesy title.

Q. If a husband and wife apply for a loan, can the bank refuse to take the wife's part-time income into consideration?
A. No. Under the ECOA, a creditor must consider the income of a married woman when a married couple applies for a loan, even if the wife is employed only part time.

Q. Can a creditor insist that a wife use her husband's surname on her account?
A. No. A creditor cannot refuse to open or maintain an account in the wife's first name and "maiden" name, in the wife's first name and husband's surname, or in a combined name.

Q. If a married woman applies for a loan, can a creditor ask for information about her husband or insist that he cosign for the loan?
A. A creditor can ask for information about her husband if she relies on

his income to support the credit application, if he will be using the account or be liable for it, or if they live in a community property state or rely on property in a community property state to support the credit application. A cosignature may also be required when both spouses have vested rights in the security for a loan, as when both spouses own stock that is being put up for collateral. But a creditor cannot require a cosigner or the husband's signature just because the woman is married.

Q. Can a creditor ever treat married people and single people differently?
A. Yes. A creditor can take into consideration the differences in property rights between married people and single people. Whether a person is married or single may have a lot of bearing on how much is owed or owned. But it is illegal to base a decision to extend or deny credit solely on the basis of marital status.

Q. Can creditors ask a widow or divorced woman to reapply for credit?
A. If a woman becomes widowed or divorced, a lender cannot require her to reapply for credit for that reason alone. But, if she is widowed or divorced and if she relied on her husband's income to support her credit application, a creditor can ask her to reapply. Under these circumstances, a creditor can also change the terms of her account or close it. However, a creditor may not automatically change or cancel her credit following her divorce or her husband's death in the absence of some change in her ability to pay. If she did not rely on her husband's income to support her application, her creditors cannot modify her credit in any way unless there is some indication that she is no longer willing or able to pay the debt.

Q. If a husband and wife have maintained joint credit, will a credit bureau have credit information on the wife in her name or her husband's?
A. Creditors must furnish information to credit bureaus and other creditors about any account used by both husband and wife, or for which both are liable, in both names.

Q. If a couple has joint credit, but one spouse now wants to establish separate credit, will a creditor take into consideration the credit history they established together?
A. Yes. If a credit history is used in creating a credit application, the creditor must consider the history of any account a couple held jointly. The creditor must also consider any information an applicant can offer to show that a favorable history on any account in the spouse's name reflects his or her own credit history accurately. Similarly, if the account shared with a spouse shows an unfavorable history, a creditor must consider any information that the applicant can offer to show that the account does not reflect his or her credit history accurately.

TAXES

Q. Who is responsible for paying taxes?
A. Regardless of which spouse pays the taxes, if each name appears on a state or federal personal income tax return, both parties signing the return are generally responsible for the taxes owed. If a couple files jointly, the Internal Revenue Service (IRS) holds each one responsible for the entire debt.

Q. Will getting married reduce a couple's taxes?
A. Whether marriage will in fact result in any tax saving is a question that can only be answered by an accountant, tax attorney or other specialist with knowledge of a couple's particular financial situation. In general, though, couples who earn about the same amount are likely to pay less tax if they are married, and they are certainly likely to have more disposable income than unmarried people living alone. Furthermore, if one earns much more than the other, he or she is likely to pay less using the tax status "married and filing jointly" than if he or she were single.

Q. Should a couple get a divorce to reduce taxes?
A. Divorce is not recommended as a tax avoidance procedure for married couples. But in one celebrated case, a couple did just that. Both spouses made substantial incomes, and together they were paying much more than they would have paid filing separately. So they divorced, filed as single people, and then remarried. They did this twice! Finally, however, the IRS objected, arguing that their divorce was a sham designed to avoid paying taxes, and asked that they be made to pay the tax they would have paid had they filed jointly, as well as interest and penalties. The tax court ruled in favor of the IRS.

Q. Can someone make a tax-free gift to his or her spouse?
A. Under federal law, a taxpayer may give his or her spouse any amount of money without incurring any federal gift taxes, so long as it is an outright gift, or a proper trust (see page 70) is set up. Under state law, the trend in most states is to do away with gift taxes on gifts between spouses, but this is not yet the unanimous rule. Therefore, people planning to make a substantial gift to their spouse or to set up a trust should get advice on the laws of their particular state.

DOING BUSINESS TOGETHER

Q. Are there any problems in going into business with a spouse?
A. Today husbands and wives can enter into business together with a lot more ease than in times past. Nevertheless, there are problems engaging in a business enterprise with your spouse that do not normally occur when

the business relationship involves someone other than husband or wife. Part of the problem has to do with the fact that husbands and wives have a unique relationship in the law—a relationship that requires them to deal honestly and fairly with each other. It is advisable to seek professional advice before undertaking any substantial business enterprise with your spouse.

Q. Can someone earn wages for working in his or her spouse's business?
A. Yes. Most states do allow spouses to agree to pay one another wages, but in case of a dispute between spouses over those wages, there may be trouble collecting.

Q. Can someone allow his or her property to be used to secure a loan to a spouse?
A. Yes. But the property may be lost to the creditor if the spouse does not pay his or her debt. This is true even if the couple has since been divorced.

Q. Can someone invest in his or her spouse's business?
A. Yes, but someone contemplating business dealings with a spouse needs professional advice, just as he or she would in business dealings with someone outside of the marriage.

Q. Does an employee have to pay taxes on money earned when working for his or her spouse?
A. Yes. If an employee earns wages for working in a spouse's business, those wages are subject to income tax. Incidentally, the wages are also considered income for the purpose of determining eligibility for an Individual Retirement Account (IRA).

Q. Does that mean the spouse who stays home has to pay taxes on the support received in return for doing housework and child care?
A. No. Homemaking and child care done within the marital home are not considered wage-earning activities by the Internal Revenue Service, even though one spouse may receive financial support for doing them. If, however, a spouse takes those skills outside of the marital home, and does homemaking or child care for anyone other than his or her spouse, the IRS does consider the money received to be taxable wages.

BANKRUPTCY

Q. What is bankruptcy?
A. Bankruptcy is a procedure, administered under federal law, designed for people who have incurred more debts than they can pay. When a debtor files for bankruptcy, a court administers a plan under which the debtor's property (minus certain exemptions) and money are divided among the

creditors. By filing for bankruptcy, a person may have his or her debts discharged (cancelled) by operation of law. But some obligations, such as taxes owed, alimony and child support, are not discharged by bankruptcy.

As an alternative to this type of bankruptcy, federal law also provides "Chapter 13 bankruptcy," in which the debtor keeps his or her property but the court sets up a plan under which the debtor repays creditors over time. This form of bankruptcy, however, is available only to people who have regular incomes.

Q. Can a couple file for bankruptcy together?
A. Yes. The Bankruptcy Reform Act of 1978 permits husbands and wives to file for bankruptcy jointly.

Q. If one party wants to file for bankruptcy, should his or her spouse also file?
A. Generally speaking, if a couple has no joint debts and does not own any property jointly, there may be no compelling reason for both to file. The more debts and property held jointly, however, the more likely the couple should file together.

Q. Can a debtor give all of his or her property to a spouse and then file for bankruptcy?
A. No. This would probably be overturned as a "fraudulent conveyance." If a creditor or bankruptcy trustee could show that the property had been transferred to prevent it from being divided among creditors, a court would probably rule that the spouse was only holding the property in trust for the bankrupt spouse. The bankruptcy court would probably order the spouse holding the property to turn it over to the bankruptcy court trustee for division among the creditors.

Q. If a couple is divorced, can the subsequeat bankruptcy of one of them affect the other?
A. Yes. By law, alimony and child support are not dischargeable in a bankruptcy proceeding, but the same is not true for debts. If a former spouse was ordered to pay creditors for the debts incurred during the marriage, or if a former spouse was ordered to make property settlement payments following a divorce, those obligations may be dischargeable in bankruptcy. If they are dischargeable, the other party may become responsible for paying the creditors and may likewise lose the property settlement payments. A former spouse's bankruptcy can have serious consequences.

Q. Is a working spouse obligated to provide a pension for a dependent spouse?
A. No. No spouse has an obligation to provide a pension for the other. Married people are obligated, however, to support one another. Ordinarily, husbands and wives plan for their retirement with a financial plan, and provide for one another after death through estate planning. For divorced couples, what each owes the other will have been set by a court at the time of the divorce in accordance with state law; the working spouse's pension and any money set aside for retirement will probably be treated as part of the common property of the marriage, subject to division by the court.

Q. If one spouse will receive a pension, but the other will not, how can they be sure that the pension will continue if the spouse receiving it dies?
A. It will generally depend upon whether the pension rights are vested. If the pensioner were to die without vested pension rights, the spouse will probably receive nothing. However, if the pensioner were to die after his or her pension rights were vested, under the Employee Retirement Income Security Act of 1975 (ERISA) the spouse would be entitled to one-half of the pension if the following conditions were met:

1. The couple were married a full year before the pensioner started getting the pension, or they were married a full year before the recipient died; and
2. The surviving spouse had the right to receive benefits from the recipient's pension.

Q. How much money will a surviving spouse receive from a pensioner's plan after the pensioner dies?
A. Under ERISA, which governs most pension plans, if the above requirements are met, the survivor is entitled to at least one-half of the benefits his or her spouse received while alive. Some plans pay more, but that is unusual.

Q. Can a spouse receive Social Security benefits based on his or her spouse's earnings?
A. Yes. But it will depend upon the circumstances in each case. These benefits may be in addition to benefits the spouse receives based on his or her own work record.

Until recently, a husband who wanted to receive Social Security benefits based on his wife's eligibility had to prove that he was dependent on her for support. But courts have struck down this requirement. Now men or women may receive benefits based on their spouse's eligibility or their own eligibility, whichever is larger.

Q. If one spouse is disabled, can the other receive benefits as a result of the disability?
A. Yes. If the spouse of the disabled person meets the requirements for retirement benefits under Social Security, he or she may also qualify for disability benefits. A local Social Security Administration office will provide the specific requirements for disability benefits and any other benefits that may be available.

Q. Can a person who divorces his or her spouse after years of marriage receive retirement benefits from Social Security based on the other spouse's work record?
A. Yes. The spouse has to be at least sixty-two years of age; the parties must have been married for at least ten years; and the spouse must be unmarried at the time he or she applies for benefits. If these conditions are met, the nonworking spouse may be entitled to some Social Security benefits.

Q. If a spouse dies, will the survivor be entitled to Social Security benefits based on his or her earnings?
A. Widows and widowers can get survivor's benefits from Social Security if the following conditions are met:

- The spouse was fully insured under Social Security at the time of death;
- The survivor meets the age requirement;
- The survivor is now unmarried or has remarried after age sixty; and
- The survivor and the deceased had been married at least nine months (except that there are a number of exceptions and alternatives to this provision).

Younger widows and widowers, under age sixty, can get mother's or father's insurance benefits if the deceased was fully or currently insured under Social Security and the survivor is caring for the child of the deceased.

Q. Can someone provide for his or her own retirement?
A. Yes. But he or she may not necessarily receive any immediate tax relief by doing so. Under the old 1981 Economic Recovery Tax Act everyone with any earned income was eligible for an Individual Retirement Account (IRA). Persons establishing an IRA did not have to pay tax on this money until they withdrew it after age 59½ or on becoming disabled. The tax laws respecting IRAs were recently changed by Congress. While individuals may still fund IRAs for their retirement years, contributions to an IRA are not always tax free. Contact a tax advisor for details.

ESTATE PLANNING

Q. Should a couple have a will?
A. There should probably be two wills, one for each person. There

should certainly be at least one. Without a will, a person has no say in how his or her estate will be distributed after death. Without a will, an estate will be distributed according to state law, which varies from state to state, and state law may not lead to results one would want. See chapter six for details about the distribution of property when a spouse dies with or without a will.

Q. Is a lawyer's help really necessary?
A. Estate planning is a very complicated area of law. It is advisable to have a lawyer's help in planning an estate and writing a will; otherwise there is a serious risk that the estate will incur unnecessary taxes and administrative expenses. If an estate is not very big, having an attorney write a will should not be very expensive.

Q. What if state law would distribute an estate the way one wants?
A. One should still have a will. Without a will, there may well be delayed inheritance for heirs, and there is no certainty about who will be appointed to manage the estate. A carefully drawn will can also save the estate (and thus its heirs) money which otherwise would go to administrative costs. Under a carefully drawn will, taxes may be avoided or minimized. Besides, state laws can change. And the deceased may own property in another state where the laws are not the same.

If both spouses die intestate (without a will) and the couple has minor children, the court will appoint a guardian for those children. With a will, one can name a guardian subject to the approval of the court, but without a will that decision rests entirely with the court. On the other hand, if just one spouse dies, and the court appoints the other spouse guardian of the children's inheritances, the court will most likely retain control over the money. This can mean a lot of aggravation to the surviving spouse (or to whomever is appointed guardian). The guardian might have to keep detailed records proving that all of that money he or she receives is being used for the children's benefit. In some situations, the guardian might even have to get court permission to use the money. Much of this trouble can be avoided with a properly written will.

Q. When should one make a will?
A. The best time to make a will is when one is in good health and not under unusual emotional stress. Waiting, and making a "deathbed" will, could lead to long, expensive litigation.

Q. Once a will is made, does it ever have to be changed?
A. A will should be reviewed periodically to determine whether any laws have been changed that could affect it (such as tax law), whether the estate has changed in a way that would affect its disposition, and whether the family situation has changed in a way that would affect the will. People

frequently fail to update their wills to reflect the births of children or grandchildren and even divorce, all of which can lead to needless and costly lawsuits involving persons who should have been included in or excluded from the will.

Q. Can an unmarried couple have an estate plan?

A. Yes. Through their wills, unmarried parties living together may direct that certain portions of their property go to the person with whom they are living or to a third party. But they should be careful in devising an estate plan. The law does not extend the same protections to an unmarried couple's property rights as it does to married persons. The law, for example, provides a wife with an automatic share in the marital estate, which she cannot be divested of by her husband's will. Likewise, upon divorce, the court can make a fair and equitable division of the assets from a husband and wife's joint estate plan. The same, however, is not true for unmarried couples. Unmarried couples have no right by law to each other's assets, which poses some danger in structuring joint estate plans.

Children 3

THE DECISION TO HAVE CHILDREN

Q. Do couples have a right to information about contraceptives and a right to use them?
A. Yes. The decision to use contraceptives is a personal one. Married couples have a constitutional right to information about contraceptives and a right to use them.

Q. Does a woman need her husband's permission to use birth control?
A. No. Adults have a right to control their own bodies. For a woman, this includes the right to use contraceptives. However, if one spouse desires children and the other spouse refuses, this may be grounds for divorce. If either spouse concealed his or her unwillingness to have children before the marriage, knowing that the other spouse wanted children, the marriage may be subject to annulment.

ABORTION

Q. Does a woman have a right to an abortion?
A. Yes. The Supreme Court has ruled that in the first three months of pregnancy the decision to abort or not abort is up to the woman and her doctor. In the second three months, states may regulate the way in which abortions are performed but they may not prohibit them. A woman has no constitutional right to an abortion in the final three months of pregnancy unless her life or health is seriously endangered. The Supreme Court

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continues to consider cases on abortion, however, and it is possible that the answers to the questions in this section will change.

Q. Does a woman need her husband's consent to have an abortion?
A. No. The decision whether or not to bear a child rests with the woman, and states cannot require a husband's consent. Hospital rules that require the father's approval for abortions have been struck down when the hospital receives federal funds. Private hospitals not receiving federal funds can set their own rules governing abortions.

Q. Does a pregnant minor need the consent of her parents?
A. The Supreme Court has struck down state laws giving parents of unmarried, underage girls an absolute veto over their daughter's decision to have an abortion. However, the Supreme Court has upheld a state law which requires a physician to "notify, if possible" the parents or guardian of an unmarried minor prior to performing an abortion on her.

Q. Can abortions that aren't necessary for health reasons be publicly funded?
A. The Supreme Court has ruled that that decision is up to the states and localities. They may choose to fund such abortions, but they do not violate the Constitution if they choose not to do so.

REPRODUCTION AND CHILDBIRTH

Q. Can a wife bear a child against her husband's wishes?
A. Yes. She has the right to make decisions about how to use her own body.

Q. Does the law regarding parentage vary depending on how a child is conceived?
A. It may. Children conceived as a result of sexual intercourse are automatically considered the lawful offspring of their biological parents.

In recent years, however, scientific advances have produced new methods for conceiving children. These include artificial insemination, *in vitro* fertilization and egg donation. The law is evolving to take account of these new technologies. Most states, for example, have statutes that provide that the husband who consents to his wife's conceiving by insemination with a donor's sperm is the legal parent of that child.

Q. What about surrogate parenthood?
A. Surrogacy is an arrangement by which a woman agrees, with or without compensation, to bear a child for another couple, usually when the wife of that couple is unable to conceive or carry a child to term. The surrogate mother is inseminated with the husband's sperm so that the hus-

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band is the biological father of the child. The surrogate mother agrees to relinquish all parental rights at birth, and the biological father's wife then legally adopts the child. A few states outlaw commercial surrogacy (where money is given to the surrogate mother), and others are considering legislation that would heavily regulate its practice.

Q. Does the law regulate where one may choose to give birth to a baby?
A. It may. For example, in some states home births (having a baby at home, with or without a doctor) are discouraged. It may be difficult to find a doctor willing to attend a home birth. Some couples whose infants died or were injured during home delivery have been threatened with child abuse charges. Additionally, insurance companies may be unwilling to extend malpractice insurance to medical doctors when they assist at home births. Many hospitals today have "alternative birth" facilities which are intended to provide a home-like atmosphere and quick access to medical services. In addition to hospital-affiliated birth facilities, there are maternity or birthing centers run by midwives in some states.

Q. Does the law regulate who can deliver a baby?
A. Probably. State laws on who can deliver babies in nonemergency situtions vary widely. In some states only a medical doctor can attend a delivery; in others, nurse-midwives or lay midwives may assist at a birth.

Most states have licensing procedures for nurse-midwives, who usually work under the supervision of a medical doctor or in hospitals. Lay midwives—people who deliver babies but are neither medical doctors nor nurses—may face charges for practicing medicine without a license in states that do not permit lay midwives to attend births.

Q. May a husband be present at the birth of a child?
A. If the child is born in a hospital, the hospital can set its own rules and procedures (subject to the requirements of state licensing boards). Thus, expectant parents should check whether a hospital allows the father or siblings or both to be present at childbirth. If not, and if the parents feel strongly about the husband or siblings being present, they can consider having the baby in some other setting.

PATERNITY AND SUPPORT

Q. What legal recourse does a husband have if his wife bears a child that is not his?
A. The law presumes that a married woman's child is her husband's. He is responsible for the support of the child unless he can prove to a court that he is not the father. In some states the presumption of paternity is absolute, and a husband cannot disprove paternity of a child born during the marriage.

Q. If state law permits the husband to disprove paternity, how may he attempt to do so?

A. State law will determine the evidence that may be admitted at a trial. For example, under some state laws, a husband may only attempt to show (1) that he is impotent or sterile or (2) that blood tests show that he cannot be the child's father.

Q. Can an unmarried mother legally compel the father of her child to support the child?

A. In most states, the parents of a child born out of wedlock have an equal responsibility to support the child. If the father admits paternity, the mother is well advised to have him sign a statement to that effect, so that the basis will be laid to compel him later to help support the child, if that becomes necessary. If he does not admit that he is the father, she can file a paternity suit (a civil action) against him. If the suit is successful, the court will compel him to provide support. In some instances, he may also be required to pay her pregnancy expenses.

Q. How can an unmarried woman establish that a particular man is her child's father?

A. Paternity suits traditionally encompassed a wide range of evidence. Among the evidence that could be advanced to prove paternity was proof that the man had sexual intercourse with the woman near the time of conception, witnesses who would swear that the man had acknowledged that he was the child's father, and letters that the man may have written to the child as his father. To disprove paternity, the man could advance evidence to show that he was out of state for the entire period during which the child might have been conceived, evidence that the woman had sex with other men at the approximate time of conception, and other evidence that would cast doubt on her evidence.

Q. Can't modern science determine paternity conclusively?

A. More and more, scientific evidence is being used in such cases. The blood tests used throughout much of this century were useful only up to a certain point. They relied on the blood types of the woman and the man. If the blood types of the mother and father are known, under the laws of genetics their child will have one of several blood types and definitely will not have others. Thus, this type of blood test might provide evidence that a particular man could *not* be the child's father. It couldn't demonstrate conclusively that he was the child's father, however, since any other male in the same blood group could have fathered the child.

A new test—the Human Leucocyte Antigen (HLA) test—matches not only blood type but also tissue type and other genetic factors. Medical experts say that it is 98 percent accurate in determining paternity. DNA

testing, another new tissue-testing procedure, is said to be even more accurate. Through DNA testing on cells from the skin or on samples of semen or blood, medical experts believe that they can determine paternity with 99 percent accuracy. These new tests almost always determine who will prevail in a paternity suit, but if they are inconclusive the older blood test and the traditional kinds of evidence may come into play.

Q. Can anyone besides the mother file a paternity suit?
A. If the mother applies for public assistance, the public agency often files a paternity suit so that it can get reimbursed by the father. Under the Uniform Parentage Act, which has been adopted by a third or more of the states, any interested person can file such a suit on behalf of the child.

Q. If a man is found to be the child's father, how much will he have to pay in support?
A. Unmarried parents are as obligated to support their children as married parents are. See page 65 for information about levels of support. The father is also often required to pay the legal costs of paternity suits.

Q. How long will such support continue?
A. As with legitimate children, the obligation of support generally lasts until the child is no longer a minor.

Q. What happens when a man is found to be the child's father but still doesn't provide support?
A. The courts can compel payment of the judgment by assigning a portion of his wages to the child, garnishing his wages (automatically transferring the owed amount from his pay), attaching his property, attaching his bank account, or jailing him for contempt of court. In some states, the failure of a man to support a nonmarital child is a criminal offense for which he can be prosecuted.

ADOPTION

Q. What is adoption?
A. Adoption is the process by which a person or persons become the legal parents of someone who is not their biological child. In order for any adoption to be legal, the legal rights of the biological parents must have been terminated, the appropriate adoption procedures for the particular state must be followed, and the adoption must be approved by a judge.

Q. How is adoption different from foster care?
A. Adoptive parents have exactly the same legal rights and duties as biological parents; foster parents generally care for a child for only a limited period of time. Usually, a child under the care of the state is placed with

foster parents (who are paid for their services) until a more permanent relationship can be arranged.

Q. When may a child be adopted?
A. Laws governing adoptions vary from state to state. In most states a child may be adopted only if his or her biological parents consent to the adoption or if their rights are terminated by court order after a finding of parental unfitness. If the child is 10 or over (the age varies with state law), he or she may also have to consent to the adoption.

Q. Assuming the biological parents' rights haven't been terminated, must both consent to an adoption?
A. If the parents were married and both are alive, both must consent to the adoption of their child. If the parents were not married, the mother must consent. Because of recent Supreme Court rulings, the father's consent may also be needed. An unwed father who has provided financial support and has had ongoing contact with his child probably does have the right to give or withhold consent to the child's adoption. On the other hand, a father who has abandoned or neglected his children may be entitled only to notice of the adoption, and, in some cases, not even to that.

Q. What are the ways of adopting a child?
A. There are three types of adoption: agency, related, and independent (private). Every state permits "agency" adoption. In this type of adoption, a private or public agency has received authority, either from the child's biological parents or from the state, to consent to the adoption of a child in its custody. The agency interviews prospective parents and conducts an investigation to determine which applicants will best serve the child's needs. Each agency has its own standards and procedures. Some states regulate the fee an agency can charge. Other states leave that decision to the agency and the adoptive parents.

A "related" adoption is one in which a child is adopted by relatives, such as grandparents or an aunt and uncle. Stepparent adoption (in which the child is adopted by someone who is married to the child's biological mother or father) is a type of related adoption. (If the stepparent doesn't adopt the child, he or she has considerably different legal obligations to the child. See page 67.)

"Independent" (private) adoptions are usually arranged through an intermediary, such as a doctor or lawyer, who has some contact with the child's biological parents. The adopting parents often pay the biological mother's medical expenses and legal fees. Independent adoptions are illegal in some states.

Q. What criteria are used to determine if would-be parents can adopt?
A. All agencies have criteria to assess applicants, as do states in which

the law requires that private adoptive parents be investigated. The best interests of the child underlie all these criteria. The applicants will be examined to make sure that they are in good health, that they can afford to care for the child, and that their home environment will be good for the child. Their age will be considered too—they must be mature enough to understand the responsibilities of parenthood but vigorous enough to undertake them.

Q. Can single people adopt?
A. Yes, according to the laws of many states.

Q. Are adoptive parents on probation for a period of time?
A. Most states require a probationary period, usually six months or a year, for nonrelated adoptions. During this time the child lives with the adoptive parents, and a state-licensed agency or an individual appointed by the court monitors the family to make sure the child is properly cared for. If the relationship is satisfactory, the agency will ask the court to make the adoption permanent. If it is not, the child will be returned to the agency or individual so that the child can be placed in another adoptive home.

Q. What is a black market adoption?
A. In some "black market" adoptions, the adopting parents pay the biological parent(s) or an intermediary a sum of money that exceeds reasonable costs associated with the pregnancy and adoption. This is considered the buying and selling of a child and is a crime in all states. Even if an excessive fee is not charged, an adoption is "black market" if it is outside the procedures authorized by state law.

Q. Are parental obligations different toward adopted children?
A. No. Parents have the same rights and obligations toward their adopted children as they do to their biological children. The biological parents of a child who is adopted usually relinquish all rights of parenthood and usually sever all ties to that child. In some states, however, a biological parent may have a duty to support the child even after adoption. An adopted child sometimes has a right to inherit from biological parents, but biological parents have no right to inherit from a child given up for adoption. In the event of divorce between adopting parents, the adoptive parents, not the biological parents, are normally required to support the adopted child.

RIGHTS AND RESPONSIBILITIES OF CHILDREN

Q. What are the legal rights of children?
A. Children have a unique status in the law. It is impossible to fully explain this status in this booklet, but we can point out a few major differences

between adults and children.

Children are defined as those persons under the age of majority set by their state (usually 18), who are not married and have not left home to support themselves (that is, minors who are not "emancipated" in the eyes of the law). Under the law, children are:

- protected from abuse and neglect.
- entitled to the protection of the state. They may be temporarily or permanently removed from their home if that is necessary to ensure them a safe, supportive environment.
- subject to the juvenile courts of their state, rather than the regular criminal justice system. (In some states, children above a certain age, usually 16, can be tried in court as adults.) In the juvenile courts, they are entitled to only some of the due process safeguards that adults are entitled to. In return, these courts are given more latitude in dealing with juveniles, on the assumption that children are delinquents rather than criminals, and, under the protection of the court, can be rehabilitated.
- entitled to make contracts with adults and have them enforced against adults, but these contracts usually cannot be enforced against them as long as they are under the age of majority or are not emancipated. (This is to protect children from the consequences of their immature judgment. It means in practice that adults and other children are normally very reluctant to make a contract with a minor.)
- entitled to sue, but an adult legal representative must initiate the suit.

Q. What responsibilities do minor children have?
A. In general, children must submit to reasonable supervision. A parent has the right to discipline his or her children when necessary (but not to use excessive force), and the children must obey the parent.

Q. What are the responsibilities of adult children toward their parents?
A. In general, adult children have no responsibilities toward their parents (and their parents have no responsibilites toward them). Of course, there are exceptions. In some states, children are responsible for supporting parents who otherwise would be on welfare (unless the children can show that the parents did not take care of them when they were underage). And in some states children may be responsible for contributing to the support of parents in a state hospital or mental institution, though the amount they must pay is usually based on ability to pay, and not on the actual costs incurred.

RIGHTS AND RESPONSIBILITIES OF PARENTS

Q. What are the responsibilities of parents?
A. Parents have certain legal duties toward their children. Whether married

or not, they are responsible for the support of their minor children. Parents must provide adequate food, shelter, clothing and medical care. They also must educate their children, either in a public or private school (although home schooling is allowed in some states). Parents are responsible for making sure their children attend school.

Q. How long do parents' legal obligations to their children continue?
A. Parents are legally responsible for their children until they reach the age of majority—usually 18. In some states, parents' responsibility for their children may continue throughout the children's life if the children are disabled. In most states, parents' legal duty to children ends when the children reach the age of majority, enter into legally valid marriages, or are emancipated. Normally a court will enter an emancipation order only if a minor is self-supporting and no longer living at home.

Q. What are a person's rights as a parent?
A. Parents have a constitutional right to direct the care, control and upbringing of their children. This includes the right to make decisions such as where to live, what school to attend, what religion to follow and what medical treatment to pursue. Normally the state may not interfere in these decisions. Only in life-threatening situations—such as when a child will die without the medical care his or her parents are opposed to providing—will courts step in and overrule parents. Parents who withhold medical treatment from seriously ill children have been successfully prosecuted for child abuse and endangering their children's life.

Parents also have the legal authority to control their children's behavior and social lives. Children have a duty to obey reasonable rules and commands imposed by their parents.

Parents may discipline their children appropriately. They may not, however, use cruel methods or excessive force. These forms of punishment are prohibited by child abuse and neglect laws in all states.

Q. What if parents can't control their children?
A. The only legal recourse open to parents who cannot control their children is to ask the court to declare the children minors in need of supervision and subject to court authority. Normally courts are reluctant to intervene in disputes between parents and children.

Q. Who controls the money children earn or inherit?
A. Generally, parents do *not* have direct control over their children's money. If children earn or inherit money or receive some form of support payments, that money must be used for their benefit. Unless a court appoints someone else, parents are the *guardians* of their children's money and can be held legally responsible for managing it properly and using it for their children's needs.

Q. Are parents responsible for their children's conduct?

A. The answer depends on state and local laws. Parents ordinarily are not responsible for their children's debts—except, perhaps, to the extent that they are responsible for providing necessities for their children. Some states, however, have laws making parents liable for their children's debts. If parents agree to co-sign a contract with minor children, they are legally responsible for making payments under the contract.

In some communities parents are liable for damages their children cause. Even in states or municipalities where there are no parental liability laws, parents are probably liable if they knew their children were behaving illegally or causing damage, and did nothing to stop it. They may also be liable for damage done by children who were acting as their "agent"—by, for example, running an errand for them. And they may be liable for damage caused by children if they negligently contributed to that damage. An example would be giving a child a dangerous toy.

ABUSE AND NEGLECT LAWS

Q. What is child neglect?

A. State laws make it a criminal offense for parents and legal guardians to fail to provide children with adequate food, shelter, clothes, medical treatment, or supervision.

Q. What is child abuse?

A. Special state criminal statutes apply to adults who are abusive to children in their charge. Such adults include parents, other adult family members, babysitters, and legal guardians. These laws deal with situations in which adults go beyond reasonable corporal punishment by, for example, beating children so severely that they require medical treatment. Child abuse statutes also encompass other types of cruelty that endanger children's moral and mental health, such as subjecting them to sexual molestation or extreme public humiliation.

Q. How is child neglect and abuse detected?

A. A wide range of people who come into contact with children—such as doctors, nurses, teachers, and social workers—are compelled to report suspected child abuse or are encouraged to do so by laws which grant them immunity from possible defamation suits by the accused parents (unless they acted with malice in making the report). States often encourage reporting suspected abuse through special hotlines. To track down parents who take their children to different hospitals to escape detection for repeated instances of child abuse, a number of states keep central registries of suspected child abuse cases.

Q. When can children be taken away from their parents?
A. State authorities may remove children from their parents' home if there is reason to believe the children are being physically, sexually or emotionally abused or if the children's parents are unable or unwilling to provide adequate care and support.

Q. If children are taken away from their parents, is the removal temporary or permanent?
A. Even if children are removed from parental care, the goal in most states is to reunite the family after correcting the problems that led to removal. If family reunification is not possible (if, for example, parents make little or no effort at improving parenting skills), the state may ask a court to terminate all parental rights. If parental rights are terminated, the legal bonds between parents and children are completely and permanently severed. The children are then eligible to be adopted by another family.

Conduct Toward Each Other

4

An early American jurist wrote, "Courts do not go behind the domestic curtain." Indeed, a veil of privacy shrouds the family. The law is unwilling to interfere in the relations between husbands and wives, and will usually step in only if the family is crumbling. Ordinarily, the courts have a say only when the "domestic curtain" is torn. Nevertheless, some general statements can be made about the law regarding conduct between marriage partners.

SEXUAL RELATIONS

Q. Can someone deny sex to his or her spouse?

A. Courts have held that sexual relations can't be denied without good cause (for example, illness or abuse). Sexual relations are among the duties and responsibilities married people owe one another. In practice, however, one has little recourse if his or her spouse decides to end the sexual relationship. If one spouse deliberately concealed before marriage an inability to have sex, it is possible that the other spouse can get the marriage annulled. If, in a consummated marriage, either spouse decides to stop having sex or becomes unable to have sex, this can be grounds for divorce in some states. In other states, a divorce could be obtained on "no fault" grounds. In short, although courts have held that sexual relations are a conjugal duty, the only legal remedy to a lack of sex is to end the marriage.

The fact that husbands and wives have a duty of sexual relations does *not* mean that one spouse can use violence to force the other to have sex. See page 52 for a discussion of rape in marriage.

Q. Can one spouse require the other to perform distasteful sex acts?
A. The law in this area is murky, and judicial discretion could play an important role. However, there seems to be a tendency for judges and juries to consider sexual relations to mean strictly penis penetration of the vagina. Any other sex act—for example, oral or anal sex—thus may not be considered one of the sexual "duties and responsibilities" one spouse owes another.

Again, however, courts rarely interfere in ongoing marriages, so this is unlikely to be a legal issue unless the marriage is being dissolved or violent physical force is used resulting in a civil domestic violence action or the filing of criminal charges, such as for assault and battery.

Q. Is adultery illegal?
A. Most states make it illegal for a married person to have sexual relations with someone not his or her spouse. In addition, about one-third of the states make it illegal for persons to have sexual relations with anyone to whom they are not married, whether or not they're married to someone else. (This crime is called fornication.) But these laws are seldom enforced. In practice, the most serious legal consequence of an act of adultery is likely to be the end of a marriage. Adultery is a ground for divorce in some states. In other states a divorce could be obtained on "no fault" grounds.

A sexual act cannot be adulterous unless it is voluntary. A woman who is raped has not committed adultery.

Q. If a spouse is rendered incapable of having sex, can the other spouse sue the person responsible?
A. Yes. This is called suing for loss of consortium. The idea behind this type of suit is that husbands and wives have the right to expect certain "services" from one another and therefore have a right to sue someone who deprives them of those services. Thus, for example, if a spouse is incapacitated in an accident caused by someone else, the other spouse can sue for loss of consortium, while the injured spouse sues for his or her medical expenses, suffering, and so on.

SPOUSE VS. SPOUSE

Q. How has the law governing the relationship between spouses changed?
A. Under the common law, husbands and wives were considered one entity. As a result, they could not sue or testify against one another in court. Furthermore, a husband had a practically unlimited right to control his wife, although a wife could file a criminal charge against a physically abusive husband.

The rules have changed in recent years. The courts now treat husbands and wives as separate but equal entities. "Interspousal immunity," the doc-

trine that one spouse cannot commit a legal wrong against the other, is being modified. And wives have more remedies against abusive husbands.

Q. Can one spouse sue the other for damages?
A. Probably. Most states allow one spouse to sue the other in cases of intentional injury (for example, in cases of spouse abuse) or in cases of an injury caused by negligence. This can be useful when, for example, one spouse wants to recover damages from the other's insurance company for injuries suffered in an automobile accident. Complete interspousal immunity still applies in a few states.

Q. Can one spouse testify against the other in court?
A. Yes, but only if he or she does so voluntarily. In most states one spouse cannot be *forced* to testify against the other. Courts recognize the "marital testimonial privilege," a rule based on the belief that the marital relationship would be damaged if a spouse was forced to reveal marital confidences. The Supreme Court has ruled, however, that the marital testimonial privilege does not prevent one spouse from voluntarily testifying against the other. In that situation, the consent of the other spouse is not required.

Q. If one spouse is in an accident while driving the other's car, who is financially liable?
A. The car's owner may be liable. A number of states apply the "family car doctrine." Under this doctrine, the owner is financially responsible for damage caused by a family member while driving the car if he or she has allowed the car to be used as a family car, and certain other requirements are met. In states that do not recognize this doctrine, the nondriving spouse has no liability unless the driver was acting as the spouse's agent at the time of the accident.

DOMESTIC VIOLENCE

Q. Is it illegal for one spouse to beat the other?
A. Yes. Beating a spouse is a crime in every state.

Q. What sort of treatment constitutes a beating?
A. In most states, for the law to step in, a spouse must have inflicted "substantial harm" (battery) or threatened "substantial harm" (assault). Threatening words alone do not constitute assault, but threats combined with the suggestion that action is about to follow (for example, threats plus showing a weapon) probably do constitute assault.

"Substantial harm" is hard to define. Rough treatment, by itself, probably does not constitute substantial harm. On the other hand, an injury serious enough to require a doctor's attention probably does.

Q. Can treatment less than a beating be considered abuse?
A. States are enacting more protective domestic violence laws. Such laws provide both civil and criminal penalties. Actions may be brought under such laws for abuse which is less than physical violence but which causes emotional distress. These could include sleep deprivation, disturbances at a place of employment, keeping a spouse under continuous surveillance, and threats of physical force or confinement.

Q. Should a spouse leave home if he or she is being abused?
A. In the eyes of the law, the victim has every right to leave a physically abusive spouse. This is not desertion, and the abusive spouse is still responsible for providing support.

In addition, virtually all experts say abuse victims should leave home and find somewhere safe to stay. Those who stay risk their health or even their lives. If the victim has nowhere to go, the police, churches, and social agencies will know if a shelter is available. See page 76 for a national toll-free hotline which has information and help for battered spouses across the country.

Q. Can the abusive spouse be forced to leave the home?
A. It is possible in states having expanded domestic violence laws to have an abusive spouse evicted on an emergency basis.

Q. What legal remedies are available to those beaten by their spouse?
A. There are several remedies. Unfortunately, each has potential drawbacks.

1. Call the police. However, the police may be reluctant to get involved in a domestic dispute. And, although the police may provide temporary protection, in many states they may not be able to remove the physically abusive spouse from the home unless the victim is willing to sign a criminal complaint. Despite these problems, most experts recommend that the victim call the police. Calling the police provides immediate protection and makes a court record of the beating, which can be useful in later legal action. In states with expanded domestic violence protection, this may lead to an action on the victim's behalf under the domestic violence law.
2. File criminal charges against the spouse. If convicted of assault or battery, the spouse can be sent to jail or put on probation. This may cause other problems, however. A spouse in jail cannot work and provide for the family. Also, a criminal conviction can hurt his or her ability to get a job. Furthermore, there is the risk that, when put on probation or released, the abusive spouse will be angered and beat the victim again.
3. Obtain an emergency court order, called a "restraining" order or "order of protection," that requires the abusive spouse not to have any contact

with the victim. These orders are available in many states and are usually temporary. The drawback with restraining orders is that they do not give round the clock protection. Orders of protection give complete protection because they are immediately enforceable by police action. With a restraining order, if the abusive spouse violates the order, he or she may be taken to court.

4. File a civil suit for damages against the abusive spouse. Just as in a criminal case, the victim must prove that he or she was beaten and that the beating was severe. This remedy is available in the states that permit spouses to sue each other. Filing a civil suit costs money and takes time. Unless the abusive spouse has money or property, the victim will not be able to collect enough on any judgment to make a suit worthwhile.
5. Sue for a legal separation (available in some states) or divorce (available in all states). Physical cruelty is a ground for divorce in most states. In all states, a divorce can be obtained on "no fault" grounds. If a victim sues for divorce and the spouse remains a danger, the victim may be able to obtain "exclusive possession" of the home. However, seeking a divorce may be a difficult step for a spouse who is dependent on the other spouse. (For further discussion of divorce, see page 55.)

Q. How does one file criminal charges against a physically abusive spouse?
A. The police can provide advice on how to file a criminal charge. The victim can greatly help the case by providing evidence of the beating and its severity. The evidence could include a police report, the names and addresses of witnesses who saw or heard the beating, and photographs of scars or marks. It is important to have a medical report showing the severity of the injuries suffered, so the victim should go to a doctor or hospital for treatment.

Q. Can the victim defend himself or herself against a physically abusive spouse?
A. "Reasonable force" can be used. That means an amount of force that is equal to the danger and necessary for defense. Thus a spouse might be justified in using a weapon if the other spouse were armed and advancing, but might not be justified if the other spouse was not armed or if the danger had passed.

Q. What can be done to stop one spouse from bothering the other or their children once they are separated and legal action has begun?
A. A judge can issue an "eviction" order (sometimes called a "vacate" order), a "cease and desist" order (sometimes called a "restraining" order), or a "protective" order. Under these orders, the spouse will be required to stay away from the other spouse and their children. If he or she does not obey the order, he or she can be held in contempt of court, subject

to a fine and jail. A judge can require the spouse to post a "peace bond," a sum of money that will be forfeited if the spouse does not leave the other spouse alone.

Q. Can a wife charge her husband with rape?

A. It depends on the law in the state where the act occurred. Some states do not recognize spousal rape under any circumstances. A growing number of states have changed their definitions of rape so that a husband can be charged with the rape of his wife. Some of these states allow a rape charge if the spouses are living separate and apart or have a written separation agreement. Others treat spousal rape as a crime even if the spouses are living together, but prosecution is usually difficult unless there was some other act (such as a beating) in addition to the rape. Regardless of the rape law in particular states, there are probably other criminal laws (such as those prohibiting assault) that provide a remedy for a spouse who has been raped.

Breaking Apart 5

Any discussion of law and marriage must include the possible consequences of a failed marriage, since it is only when a marriage is over that it is likely to come to the attention of a court.

Dissolving a marriage can be a very complicated legal affair. From the standpoint of the individuals involved, it is likely to be both difficult and painful. People seeking termination of a marriage through separation, annulment, or divorce almost certainly require the help of a lawyer. Ideally, each should have a lawyer.

SEPARATION OR SEPARATE MAINTENANCE

Q. What is separation?

A. Separation is sometimes also called separate maintenance. Under either name, a couple remains married but stops living together. Separations are often the first step toward a divorce. However, separations need not lead to divorce. They are sometimes used by people who are incompatible but, for religious or other reasons, do not wish to divorce. Separated couples retain many of the rights and obligations of married couples. For example, they cannot remarry, and in some states they retain rights to inherit from one another.

Q. What are the types of separation?

A. One form of separation is "desertion," when one party leaves without the other's consent and without providing for the support of the spouse and children. In many states, a deserted spouse can sue for formal separation. Desertion is also one of the frequently used grounds for divorce.

Couples often separate by "mutual consent." Not all separations must be "legal"—that is, accompanied by a formal document in which the parties set out their rights and duties toward each other. Some couples just decide to live apart. However, it is advisable for such separated couples to have a separation agreement—a contract in which they agree to live separately and cease sexual relations. The separation agreement also should establish their financial and child custody arrangements, as well as any other rights and duties they still owe each other. If either party breaks this agreement after it is in force, the other can sue for breach of contract.

Many states allow formal "judicial separation." A judicial separation is initiated as a lawsuit by one spouse. The other spouse need not consent, and the terms of the separation are decided by the judge hearing the case. These terms are then enforceable as a court order. A judicial separation often provides the same financial allocation and custody and visitation arrangements as a divorce would, but it leaves neither spouse free to remarry. A number of states allow a judicial separation to be converted into a divorce after a specific amount of time.

ANNULMENT

Q. What is annulment?

A. An annulment is a declaration by a court that an apparent marriage is not valid because of a defect that existed at the time of the attempted marriage. The most serious defects—typically bigamy, incest, or marriage to an underage person—violate state law and make the attempted marriage void. Other defects, such as fraud (see below), duress, or mistake of fact, make the marriage voidable. This means the marriage is considered valid until it is invalidated by one of the spouses petitioning a court for annulment.

Annulments are not ordinarily granted for anything less than substantial reasons. Most often they are awarded on the ground of fraud, in which one party deliberately concealed important information from the other before the wedding. Important information is usually defined as information essential to the formation of a valid marriage. Some courts define it as information that, had it been known, would have kept the other person from consenting to be married. For example, if one party concealed a prior divorce, inability to have children or to have sexual relations, a criminal record, or a serious illness, that might be a ground for an annulment.

Q. How common is annulment?

A. Annulment is a far less common way to end a marriage now that divorces are quite easy to obtain. While sharply different from divorce in theory—annulment depends on problems at the time the marriage began; divorce depends on problems arising after the formation of a valid marriage—the two kinds of dissolution may have similar consequences.

Children of annulled marriages, like children of divorce, are considered legitimate. Parties to an annulled marriage are free to remarry. Many states authorize courts to distribute property and impose support obligations in the event of annulment. (If courts in a particular state do not have that power, parties to an annulled marriage might be entitled to property or support on the basis of nonmarital cohabitation.) Annulment sometimes revives one spouse's rights to money that were cut off by and during the defective marriage, such as spousal support from an earlier marriage or worker's compensation benefits from an earlier marriage.

DIVORCE

Q. What is divorce?

A. A divorce is a formal court proceeding by which a valid marriage is dissolved. A final decree of divorce leaves the parties free to remarry. Spouses can obtain a divorce in any state in which one of them is a resident. Many states have durational residency requirements, typically requiring that an individual live in a state for three or six months or a year before the divorce decree is issued.

Divorce law varies from state to state. It has changed tremendously in recent years with respect to all the major issues it addresses: grounds for divorce, distribution of property, propriety of spousal support, child custody and support. In addition, methods of negotiating or mediating divorce settlements have changed and are continuing to change.

Q. How have attitudes toward divorce changed?

A. At one time, divorces were granted only to people who could prove that their spouses had committed some grave matrimonial wrong that was viewed as causing a marriage's failure. Typically these were adultery, physical cruelty, or desertion. The spouse who was charged with fault in the divorce proceeding could try to defend by proving that he or she was innocent or that the other spouse was even more guilty. As a result, divorces could be very bitter, prolonged legal proceedings.

Gradually there was some relaxation of the narrow concepts of fault. For example, some courts granted a divorce if a spouse could prove "constructive desertion," which meant that he or she was made so unhappy by the other spouse that leaving home was the only alternative. Courts often permitted those seeking divorce to show "mental cruelty" rather than physical cruelty. Also there was often cooperation among spouses who would claim one was at fault and perhaps make up evidence, when actually both simply wanted out of a failed marriage. But the availability of divorce was still limited, and some couples whose unhappy marriages were in fact over were unable to find—and unwilling to fabricate—grounds for ending them legally.

Q. What is "no fault" divorce?

A. In an effort to end the dishonesty and lessen the pain and acrimony associated with divorce, all states today have laws permitting "no-fault" divorce. These often make it sufficient to show merely that a marriage has failed. The most common no-fault grounds are "irretrievable breakdown," "irreconcilable differences," or living apart for a specified period of time. The availability of no-fault grounds makes it virtually impossible for a spouse who does not want a divorce to prevent the other spouse from getting one. Although 20 states simply added a no-fault ground to their fault grounds, in fact almost all divorces now are granted on no-fault grounds. In about half the states, however, fault may still be relevant in deciding monetary settlements in divorces obtained on no-fault grounds.

Q. Are most divorces contested?

A. No. Ninety percent of all divorces are uncontested. Instead, the parties generally reach an agreement setting forth allocations of property and debt, spousal and child support, custody, and any other terms by which they want to adjust their interests. These agreements, often called separation agreements or stipulations, are postmarital contracts that are presented to the court for its approval.

Q. May a couple do its own divorce, without lawyers?

A. Most states now permit do-it-yourself divorces (the law calls them *pro se* divorces, Latin for "for oneself"). In these divorces the parties manage the entire process without lawyers. While the forms and procedures, generally available at office supply stores and the courthouse, are not difficult for average persons to understand, the subleties of a complex settlement, especially the tax consequences, may require expert guidance. For this reason, most people should seek legal and financial advice during the process of divorce.

Q. Does the court have to accept an agreement?

A. In some states agreements are presented to the court as proposals, which the court can modify. In other states, agreements on property and spousal support that have been fairly reached and are not unconscionable are binding on the court. (See page 14 for a discussion of conscionability in the context of premarital agreements.) However the settlement is reached, whether by do-it-yourself negotiating by the parties, lawyer negotiation, or mediation, it will be reviewed and approved by the court under the same standards. Even in those states in which premarital, marital, and postmarital contracts are not considered binding, postmarital agreements are almost always approved by courts and incorporated into divorce judgments.

Q. Can a premarital agreement or an agreement that the couple made while still married be used in a divorce proceeding?
A. Perhaps. Enforceable provisions from these contracts may control who gets the property at divorce or how much spousal support is granted. (See pages 13-15 for more on this topic.)

Q. What is mediation?
A. An increasing number of parties to divorce, separation, or other marital problems are using mediation to work out the terms of their settlement. This is true whether or not they are working with lawyers. Mediation is a process in which the parties, with or without lawyers, sit down with a trained facilitator and discuss their issues and disagreements until they reach resolution. The mediator does not make decisions for them (that is what an arbitrator does), nor is the process controlled by rules of evidence or by prior judicial decisions. The mediator is trained in conflict resolution and essentially teaches these skills to the parties, which enables them to work out their own agreement.

Mediation can be used to settle any or all aspects of a separation and divorce. In many states, the parties can file the agreement without the assistance of lawyers. Mediation agreements, however, are usually given to lawyers to approve, check for legality and present in the accepted format to the court. Some states permit a single "advisory lawyer" to do this for both parties.

Q. Is mediation always a good option?
A. Some critics argue that mediation is never appropriate when one spouse has been a victim of spousal abuse. Moreover, mediation is not for everyone. Some people prefer to resolve the dispute by lawyers representing them in negotiation. Some couples or individuals "need" to vent frustrations and convince a neutral third party that they are right.

Q. How much does mediation cost?
A. The cost of reaching agreement through mediation is generally less than the cost of negotiation by lawyers. Of course, as with any divorce, the exact cost depends on the complexity of the couple's finances and the presence or absence of children. The cost of mediation is generally shared by the parties.

Q. How does one find a mediator?
A. There are mediators in every state and most metropolitan areas. The address of the Academy of Family Mediators is listed in the back of this book. Since there are almost no limitations on who may claim to be a mediator, however, individuals seeking mediation in family disputes should take care to select a fully qualified and experienced professional.

PROPERTY

Q. How do contested divorces affect those which are settled?

A. Although ninety percent of all divorces are settled by negotiated or mediated agreements, it is important to know how courts decide contested divorces. Although few cases are litigated, negotiation takes place within a framework set by what the parties could expect if they chose to litigate rather than agree.

Q. Have changing attitudes about property affected family law?

A. Yes. Years ago, courts in common-law property states did not have the power to redistribute property at divorce. Their primary role with respect to property was to unscramble it and identify its ownership. They could only divide jointly held property—for example, a joint bank account or property whose title was held in both names. Now, however, courts in both common-law and community-property states have considerable latitude to distribute property without regard to which party owned it during the marriage and how it was titled.

Q. How is property divided when a couple divorces?

A. States vary in handling this. About half divide only "marital or community property," defined as property accumulated during the marriage (as opposed to "separate" property that was owned by one spouse before the marriage or inherited or received as a gift by one spouse during the marriage). Other states authorize courts to distribute all property, although in most of those states the existence of "separate" property is taken into consideration when determining who will get what.

In general, many states presume that marital property will be evenly divided after a marriage of many years. Other states reject that presumption as a rule but often do distribute property evenly after long marriages. Most states have developed elaborate criteria for the court to consider in distributing property. These may include some or all of the following:

- the length of the marriage;
- the age, health, and station in life of the parties;
- the occupation of the parties;
- the amount and sources of income;
- the vocational skills of the parties;
- the employability of the parties;
- the needs of each party;
- the standard of living during the marriage;
- the amount each party contributed to the acquisition, preservation, appreciation, or dissipation of marital property;
- the contributions of a homemaker, including child care and contributions to the career potential of the primary income-producer;

- the need of the parent who has custody of the children to own or live in the marital residence;
- whether one party will be receiving spousal maintenance;
- the loss of inheritance or pension rights;
- the income tax consequences of the property division.

Q. Is fault a consideration in dividing property?
A. Some states explicitly exclude considerations of fault. In others, some kinds of fault—most commonly economic fault—are still relevant. In those states, a spouse may be found to be at economic fault if his or her conduct during the marriage dissipated the marital assets.

Q. Is the transfer of property taxed?
A. When property that has increased in value is transferred from one spouse to the other at divorce, it is not taxed as a capital gain. The recipient takes the property at the transferor's basis, not at fair market value.

Q. What about debts?
A. In reality, relatively few divorcing families have a great deal of property to divide. Instead, they are likely to have debts, which also must be allocated at the time of divorce. Separate debts are usually allocated to the spouse who contracted them, but debts from items of benefit to both are ordinarily divided between the parties. Even if the divorce decree orders one spouse to pay a particular debt, however, the other spouse is not relieved of his or her obligation to the creditor.

Q. Who gets the house?
A. When there are minor children, the home usually goes to their custodial parent. When the house is the only substantial property asset, however, it is not possible to offset that award by giving other property to the noncustodial parent. Often in those circumstances, courts award the custodial parent possession of the home until the children reach majority, at which time the home is sold and the proceeds divided.

Q. How are pensions affected by divorce?
A. Pension or retirement benefits are important property interests to be considered at divorce, especially when they are the only significant assets a couple has accumulated. In community-property states, pensions earned during marriage should be divided as community property. The trend in common-law states is to characterize retirement benefits as property subject to division in the event of divorce. The present value of that portion of the pension that accrued during the marriage may be apportioned to each spouse at the time of the divorce, or a percentage of future benefits may be assigned to each to be awarded when the benefits are paid.

SPOUSAL SUPPORT

Q. When is alimony or spousal support awarded?

A. At one time, husbands could be ordered to pay alimony to their former wives until their former wives remarried or died. This was seen as a continuation of the historical duty of a husband to support his wife and was particularly likely in cases where the husband had been guilty of matrimonial fault and the wife was innocent.

Today support payments often are called spousal support or maintenance and are awarded not by gender or as punishment for fault but as an entitlement. Awards of support are based upon the ability of an economically stronger spouse to pay and the need of an economically weaker spouse for employment, training, or permanent support. Although much discussed in legal and popular literature, spousal support is not ordered in most divorces.

Q. What are the tax consequences of spousal support?

A. Spousal support is deductible by the payer from his or her taxable income and must be included by the recipient as taxable income.

Q. What is "rehabilitative" support?

A. The most popular contemporary spousal support is called "rehabilitative." Rehabilitative support is based on the premise that a spouse who was economically dependent or disadvantaged during marriage should become an economically self-sufficient person. Rehabilitative support is intended to provide time and opportunity for education, training, or experience to make up for opportunities lost by a spouse who subordinated career development to the primary career of the other spouse and to family responsibilities.

Rehabilitative support may be appropriate for a transitional period after even a relatively brief marriage and, in any event, is awarded for a limited duration. Some states terminate rehabilitative support if rehabilitative efforts are successful or abandoned during the specified period. Some states extend the period if rehabilitation was not achieved. Many states terminate rehabilitative support if the recipient remarries.

Q. What is permanent support?

A. Permanent spousal support is awarded for the purpose of providing maintenance for a spouse incapable of rehabilitation. It is also awarded in cases in which a spouse can attain some degree of self-support but in which there will remain a significant disparity between that spouse's earning capacity and resources and the earning capacity and resources of the economically stronger spouse. When deciding whether or how much permanent support is appropriate, courts often consider the same criteria as with property distribution. Fault remains a consideration in about half the

states and may be cause for enlarging or reducing the amount of permanent support. In a few states, support will not be allocated to a spouse against whom a divorce was granted on fault grounds.

Permanent support is generally awarded for an indefinite period of time and is subject to modification if there are substantial changes in the ability of the payer or the needs of the recipient. It terminates upon remarriage and may terminate upon cohabitation of the recipient. In some cases it may be appropriate to award both rehabilitative and permanent support.

Q. Does the law help the newly divorced spouse who must now get health insurance on his or her own?

A. Obtaining health insurance at reasonable rates is often a serious problem for divorced persons who were formerly covered by their spouse's employer-sponsored group plans and are not themselves employed in jobs that provide health insurance. That problem has been somewhat mitigated by federal legislation that now requires employer-sponsored group health plans to offer divorced spouses of covered workers continued coverage at group rates for up to three years.

Q. If one spouse supports the other through graduate school, does the supporting spouse have a right to share in the supported spouse's future earnings?

A. A new kind of reimbursement or restitution is being developed by some courts when neither property distribution or spousal support provides an appropriate remedy. It may be awarded, for example, if after one spouse has supported the other through graduate or professional school with the shared expectancy that both will benefit from the educated spouse's enhanced earning capacity, the marriage ends before any material benefits have accrued. Typically, the supporting spouse does not need rehabilitation because he or she has worked throughout the marriage, and there is no significant property to be distributed.

Under such circumstances, some states have begun to award periodic payments to the supporting spouse to compensate for contributions to the educational expenses and general support of the spouse who leaves the marriage with an advanced degree and enhanced earning capacity. Such payments may be subject to modification or termination if the anticipated earnings—the return on the educational investment—do not occur.

CUSTODY

Q. What is child custody?

A. "Child custody" is the sum of parental rights and obligations toward children. It includes the care, maintenance, support, and guardianship of children. A person with sole custody is presumed to have the exclusive right

to make the major decisions about children (where they go to school, whether they get braces, what Sunday School they attend, etc.).

Q. How have attitudes toward custody changed?
A. Until the middle of the 19th century, fathers had an almost absolute right to retain custody of their children. Then, well into the 20th century, custody of "children of tender years" was almost automatically awarded to their mothers. Today all states provide that custody be decided in the best interest of the children, without a presumption that either maternal or paternal custody is preferable. Unwed parents have the same right to claim custody as do married parents. In practice, mothers are awarded custody in a large majority of cases. However, when fathers contest custody, they are often successful.

Q. Are there guidelines in awarding custody?
A. Most states have established guidelines for courts to follow. These may involve:

- the age and sex of the child;
- the wishes of the child;
- the relationships of the child to the parents, brothers and sisters, or anyone else who may significantly affect the child's interest;
- the emotional ties between the child and the parents;
- the capacity and disposition of the parents to provide for the child's material needs and education;
- the permanence and continuity of proposed custodial environments;
- the cooperation of one parent in allowing the other parent access to the child;
- the child's adjustment to home, school, and community;
- the mental and physical health of all parties.

Q. Do some factors outweigh others in awarding custody?
A. Not really, and that has generated differing views. Some experts believe that guidelines that do not place greater weight or priority on a particular consideration make custody decisions between two fit parents unpredictable, encourage litigation, and place the parent less able to risk the uncertainty of litigation at a disadvantage. Others believe that trial judges must have broad discretion in order to determine the best interest of the child in individual cases.

Q. What other considerations are there?
A. There are two recent alternatives to giving the above factors equal weight. One is a preference or presumption favoring the parent who has been the child's primary caretaker during the marriage. Those who favor this view argue that caregiving creates strong psychological bonding which

is crucial for the child. Critics of the primary caretaking approach believe it overemphasizes primary parental relationships and undervalues secondary parental relationships.

They also argue that this is really just a disguised "tender years doctrine" favoring mothers, who are more likely than fathers to have been primary caretakers, even when they also have full-time jobs outside the home. Advocates respond that caregiving is not an exclusively maternal function and emphasize the importance of that function for the child rather than the gender of the parent.

Q. What about joint custody?
A. Another alternative is a preference or presumption favoring joint custody, a substantial sharing of physical custody and/or legal custody to share important decisions on behalf of the child. Proponents of joint custody emphasize that "parents are forever." Even though a couple's marriage may have failed, they remain parents, and it is important to protect and enrich the child's relationship with each of them. Critics worry about instability and potential conflict for the child, as well as the expense of maintaining two homes for the child.

Some states now have a presumption or preference for joint legal custody and/or physical custody. In these states, some form of joint custody is preferred in the law, and judges are generally required to establish such custody unless they specifically find that it is not in the child's best interest. These statutes vary widely and should be read and understood by any parent facing the custodial decision in divorce.

Q. What is joint legal custody?
A. Joint legal custody generally refers to both parents making major decisions about the child together. When people agree to joint legal custody, or when a court orders it, the parents must share major decisions about their children. Most states require that parents specify which major decisions they will share, and what process they will use if they do not agree. Many parents agree to mediate, and perhaps use private arbitration, before or instead of going to court. Proponents of joint legal custody point out that this is a guarantee that children continue to receive the benefit of both parents' points of view. Whether parents agree to joint legal custody should depend on the parenting pattern they established during their marriage. If they agreed about the raising of the children, even if they were fighting tooth and nail about everything else, then they are likely to be good candidates for joint legal custody.

Q. What is joint physical custody?
A. Joint physical custody refers to shared time with the children. This is what most lay people think of when they think of joint custody. It is also referred to as shared parenting or co-parenting. Shared time does not

necessarily mean 50-50 time. Shared time does mean that both parents maintain a "real" home for the children, usually including room(s) for the children and toys and clothing. Often the children spend some school nights at each home and go to school or day care directly from each home.

Q. What are the pros and cons of joint physical custody?

A. In most states, child support is influenced by the amount of time spent with each parent, once it changes from visiting to custodial time. Because it is premised on maintaining two homes for the child, shared custody is more expensive than sole custody. Proponents of shared time custody point out that it is the only way to ensure that the children do not "lose" a parent as a result of the divorce. Detractors fear that shared time parenting is inherently unworkable.

Like joint legal custody, the usual best measure of success is whether the parents substantially shared child care when their relationship was working. It is usually easiest on the children to make the custodial arrangement immediately following divorce as similar as possible to the parenting pattern immediately before the separation. One caution, however, is that children's needs for each parent change naturally as they grow. Parents should probably avoid locking in any parenting plan forever, but have some provisions for reviewing custody as the children grow.

Q. Are child custody decisions irrevocable?

A. Child custody can always be modified in the best interest of the child, since the court retains continuing jurisdiction over the case. However, a parent seeking modification through the court usually must show (at the least) that there has been a significant change of circumstances and that changing the custody arrangement would be in the best interest of the child.

Q. What is child snatching?

A. Child snatching is a form of kidnapping. Broadly defined, it occurs when a parent or agent of the parent takes or keeps a child in violation of a valid custody order. In the past, it was almost impossible to get any real help from legal authorities in this situation if a child was moved across state lines, since other states were not obligated to honor the custody award of the first state. Sometimes, in fact, the noncustodial parent was able to get the second state to award him or her legal custody under that state's laws.

Today, state and federal legislation requires that all states enforce custody decrees made in other states. These laws also make it more difficult to modify custody decrees without going back to court in the decree-granting state. The effect of all this is to make it far easier to return the child to the parent originally granted custody.

CHILD SUPPORT

Q. Who is responsible for child support?

A. The obligation to support children of a marriage was once imposed almost entirely on the husband. Today, states recognize that parents have a mutual obligation of child support. Children of unmarried parents are as fully entitled to support as children of married parents. In setting the level for support, courts consider the parents' financial resources and the child's needs. Some states have specific considerations for courts to consider including:

- the needs of the child;
- the financial resources and needs of the parent who has custody;
- the standard of living the child would have enjoyed had the marriage not ended;
- the value of the services contributed by the custodial parent;
- the physical and emotional condition of the child;
- the child's educational needs;
- the financial resources and needs of the parent who does not have custody.

Federal law requires that courts order parents responsible for child support to name their minor children as beneficiaries on any of their group or employee health and dental insurance plans, unless comparable or better coverage is available at a more reasonable cost.

All states have guidelines to determine ranges of support. These vary according to the number of children and resources of the parents. Federal law requires that the guidelines function as rebuttable presumptions, which means that the court must award the amount set by the guidelines, unless it specifically explains that the result would be unjust.

Q. How are support orders enforced?

A. Courts can enforce child support orders in a number of ways. Sometimes the court orders that an amount be withheld from the wages of the noncustodial parent. Sometimes the money is to be paid directly to the court for disbursement to the custodial parent.

Q. What happens when parents fail to comply with child support orders?

A. The court has the same range of remedies as it has in the case of unwed fathers who do not pay their support obligations, including assigning a portion of the parent's wages to the child, garnishing the parent's wages (automatically transferring the owed amount from his or her pay), attaching the parent's property or bank account, or jailing the parent for contempt of court.

Despite these sanctions, the history of noncompliance with and nonenforcement of child support orders has been a national disgrace. Recently,

there have been encouraging efforts to alleviate those problems. Federal and state parent-locator services help find parents who have attempted to escape their obligations. Under the federal Child Support Enforcement Amendments of 1984, computer networks can track child-support offenders across state lines. This law requires states to withhold income from wages of parents in arrears.

Income can be withheld from other assets to satisfy support obligations, and, under a federal law passed in 1988, must be withheld from wages under some circumstances, even for parents not in arrears. For example, beginning in 1990, employers will withhold income from wages of absent parents of children receiving Aid to Families with Dependent Children. Income withholding will become mandatory in 1994 for *all* noncustodial parents, unless the custodial parent waives the protection. Federal and state tax refunds can be withheld when parents are in arrears. Child support can also be enforced by civil contempt proceedings in court. Furthermore, past-due child support cannot be retroactively reduced and is not one of the debts that can be discharged in bankruptcy.

VISITATION

Q. If one parent is awarded sole custody, does the other parent have a right to visitation?

A. When one parent is awarded sole physical custody, there is a very strong presumption that the parent with whom the child does not live is entitled to visitation. An important consideration in awarding sole physical custody often is the custodial parent's willingness to cooperate in the child's continuing relationship with the noncustodial parent.

Q. What kind of visitation plans are established?

A. Most often, the couple themselves agree on the visitation guidelines, and the court approves them. If the couple can't agree, the court will establish visitation rights for the spouse without custody. Sometimes the noncustodial parent will be permitted the child one or two weekends a month. If the noncustodial parent lives a considerable distance from the child, he or she may get the child for a month or more in the summer. Usually, an attempt is made to see that each parent has the child for some of the major holidays.

Q. When can visitation be denied?

A. The parent with custody will need good reason to deny his or her ex-spouse visitation privileges. However, if the spouse with custody suspects the ex-spouse of heavy drug or alcohol use, of having molested the child, of planning to abduct the child, or of other conduct potentially detrimental to the child's welfare, he or she can petition the court to have the ex-

spouse's visitation terminated, or to have the child accompanied by a law enforcement officer on visits.

GRANDPARENTS AND STEPPARENTS

Q. What are grandparents' rights?
A. Even though their son or daughter is divorced, grandparents still have the right to a continuing relationship with their grandchildren. The law is usually involved when their son or daughter does not have custody and the grandparents see the grandchildren infrequently. In these cases, the grandparents can ask the court to grant them visitation rights. If they had a close relationship with the grandchildren before the divorce, this is normally no problem.

Q. Can grandparents be granted custody of their grandchildren?
A. Yes. If neither parent wants the children, or if the parents are unfit, the grandparents can be awarded custody. In making this decision, the court will examine such factors as their age, general health, where they live, and their ability to care for the children. Grandparents will not be denied custody because of their age, as long as their health is good.

Q. What are a stepparent's obligations?
A. It depends on state law. Generally speaking, one is not responsible for a spouse's children from another marriage unless one adopts them or holds himself or herself out as financially responsible for their support. Until then, their biological parents are responsible for their support. Some states, however, make stepparents who take children into their home responsible for their support in certain circumstances.

If one adopts a spouse's children, he or she becomes their legal parent, with exactly the same rights and responsibilities as the biological parent. The adoptive parent is responsible for their care and support even if the couple later divorces or the biological parent dies.

A stepparent normally has no claim to the custody of the children of his or her spouse if the marriage should end in divorce. Stepchildren ordinarily do not share in the estate of a stepparent, unless, of course, the stepparent has explicity provided for them in a will. However, stepchildren under 18 who are unmarried can receive supplemental retirement benefits from Social Security. If their stepparent has died, they can receive survivor's benefits under Social Security.

Q. If a couple is divorced, will the stepparent be able to visit the ex-spouse's child?
A. It depends. If the stepparent had adopted the child, he or she would have the same rights as the biological parent. If the stepparent didn't adopt

the child, however, the divorcing spouses may work out an arrangement themselves. If they cannot agree, the court has explicit authority under the laws of some states, and inherent authority in others, to order some visitation privileges for the stepparent if he or she can demonstrate a close relationship to the stepchild.

When a Spouse Dies 6

WILLS AND OTHER DEVICES

Q. What, if anything, is the surviving spouse entitled to if the other spouse dies?

A. If the spouse left a valid will, then the surviving spouse may "take" under the provisions of that will. The will disposes of all "probate property," which is property solely in the name of the deceased spouse or property that the deceased spouse held as a tenant in common with other persons. ("Nonprobate property" is discussed below.)

In community-property states, each spouse has a right to one-half of the property acquired during the marriage other than by inheritance or gift. The deceased's one-half interest, along with any separate property of the deceased, may be given to others, including the surviving spouse, in a will. A surviving spouse, however, may be barred from taking under the will if he or she waived any such rights in a premarital, marital, or postmarital agreement, though in some circumstances the will may override an early waiver. A surviving spouse may also be barred from taking under the will if the state disqualifies him or her because of desertion or marital misconduct.

Q. Does a spouse have to wait to receive the deceased's property?

A. Through sound planning, the bulk of a married couple's property can pass directly to the surviving spouse as nonprobate property. If the deceased does not own probate property, there is no need to probate the estate.

Q. How can one avoid probate?

A. Many legal devices, created during a person's lifetime, will convey real and personal property to the survivors immediately upon that person's death. For example, the home is usually in the name of the husband and wife, as tenants by the entirety or as joint tenants with the right of survivorship. When one spouse dies, the property passes to the surviving spouse and not to the estate. This occurs also in the case of life insurance policies in which the insured spouse names the other as the beneficiary. Other types of legal devices include joint checking and savings accounts which pass the money directly to the survivor as nonprobate property.

A major device for conveying property at death directly to the spouse is the "living trust." In setting up a trust, one person, a trustee, agrees to hold legal title to real or personal property and to manage it for the benefit of named beneficiaries. For example, a husband can set up the trust naming himself as trustee and beneficiary for his life and then have the property go to his wife as the other named beneficiary after his death. The property could go directly to her or continue in the trust, with a new trustee being appointed. The terms of the trust determine how the property is to be managed and invested and when and how much should be given to the surviving spouse.

Living trusts are often created to provide financial support over the years not only for the surviving spouse but also for other family members. The person creating the trust can treat each family member differently by providing for an increase or decrease in financial support depending on various circumstances. Like the other devices mentioned in this answer, a trust allows the beneficiaries to receive income and other property directly from the trustee without the need of probate.

Q. What if a will was drawn up prior to the deceased's marriage?

A. If the will was executed before the marriage and does not mention the surviving spouse, and if the deceased did not otherwise provide for the surviving spouse, many states may either consider the entire will revoked or give the surviving spouse the share he or she would have received if the deceased spouse had died without a will.

IF THERE IS NO WILL

Q. What if a spouse dies without a will?

A. If a spouse dies without a will, the property is distributed according to the state's intestate succession law. Although there are variations in these laws, all states guarantee that the surviving spouse will receive a share of the deceased spouse's probate estate. The amount depends on whether the deceased was survived by other close relatives such as children and parents. If a deceased spouse is not survived by close relatives, the surviving spouse generally receives the entire probate estate.

OTHER LAWS

Q. What other laws protect a surviving spouse?
A. In addition to the probate and nonprobate property a surviving spouse receives, the states have adopted all or some of the following laws to protect the surviving spouse:

- the elective share;
- the homestead;
- exempt property; and
- family allowance.

Q. What is the elective share?
A. The elective share, sometimes referred to as the statutory or forced share, allows the surviving spouse to take a share or a stated amount of the deceased spouse's property. The share is elective in the sense that the surviving spouse may elect to take this share instead of taking under the will or according to the intestate succession laws of that state. For example, the surviving spouse may have been effectively disinherited by being given little or nothing in a will or by the fact that there is little or no probate property to be distributed under the intestate succession laws. The purpose of the elective share is to protect the disinherited surviving spouse.

The states vary on what the surviving spouse can claim as his or her elective share. In some states, the elective share is either a "fee simple" interest in a specified proportion of the deceased spouse's land (that is, an interest in the property which the surviving spouse can dispose of in any way he or she desires), or a one-third or one-half interest of the probate estate, or, in the case of disinheritance by a will, the share the surviving spouse would have received under the state's intestate law had the deceased spouse died without a will.

Other states give the surviving spouse the choice of taking one-third of "the augmented estate." This "augmented estate" is computed by combining three elements: 1) the net probate estate, 2) the value of certain specified property that the deceased spouse freely transferred during the marriage to third persons without the consent of the surviving spouse, and 3) the value of the property that was given freely by the deceased spouse to the surviving spouse and which the surviving spouse retains at the deceased spouse's death.

The surviving spouse is entitled to an amount equal to one-third of the augmented estate. This amount is first reduced by what the surviving spouse receives or has received under the first and third elements. Then persons who received property either by will, intestate succession or by virtue of a gift that is specified in the second element might have their gift reduced to make up any remaining amount due to the surviving spouse who was disinherited.

Q. What are homestead laws?

A. Homestead laws allow property owners to set aside a certain amount or value of their residences and certain items of personal property which cannot be taken by their creditors. The amount of money or property that can be protected as one's homestead varies among the states. The homestead claim can be taken during the property owner's lifetime, and in most states, if the property owner did not make a homestead claim, his or her surviving spouse and minor children can make one. This homestead exemption continues during the lifetime of the surviving spouse or while the couple's children are minors. Some states give complete title of the homestead to the surviving spouse and minor children, so that it is forever protected against the deceased spouse's creditors and can be disposed of as these heirs see fit.

Q. What are exempt property laws?

A. At the death of one spouse, the surviving spouse and/or the surviving children are entitled to exempt property allowances. State laws vary both in the amount and type of property that may be claimed. In some circumstances, money can be taken in lieu of property. These exempt property allowances provide protection against creditors, and can also serve to protect the surviving spouse against disinheritance.

Q. What are family allowance laws?

A. In addition to homestead and exempt property allowances, the surviving spouse and children are entitled to a family allowance. State statutes authorize a court or the personal representative of the estate to pay the surviving spouse and children an amount of cash for their support while the estate is being administered. Some states set a limit on the amount of money that can be given and the time period for receiving that money, while other states permit a court to decide these questions and do not set any limits. The family allowances may also protect the surviving spouse and children from the claims of creditors.

Homestead laws, property exemptions, and family allowances are usually *in addition to* (1) the intestate share (what the spouse receives when there is no will) or (2) the elective share or (3) what the surviving spouse receives under the will. However, the law or the terms of a particular will might not make all these provisions available to the surviving spouse.

CHILDREN AND INHERITANCE

Q. What are children entitled to when their parents die?

A. Children are entitled to take any property given to them from a trust, joint account, or other legal devices created specially for them. As far as probate property is concerned, children are entitled to take whatever is given them under a valid will. If a will that was executed before a child was born

or adopted does not mention the child, and if the parent fails to provide otherwise for the child, that child, referred to as a "pretermitted heir," can usually receive what he or she would have received had the parent died without a will. However, almost all states permit parents to disinherit their children if the will shows a clear intent to do so.

Unlike a disinherited spouse, disinherited children cannot take an elective share. However, they may be protected by the laws governing homestead, exempt property allowances and family allowances as outlined above. The homestead laws will benefit children, but only while they are minors, and some family allowance statutes extend coverage only to minor children. Exempt property statutes are not always available to children, especially if there is a surviving spouse.

Q. What if a parent dies without a will?

A. If a parent dies without a will, the children will take a share of that parent's probate estate according to the intestate succession laws of the state. The share the children receive will depend on who survives the parent and on the particular division of the property in the state's law. Usually children share their deceased parent's estate with their surviving parent. In most states, if there are no close relatives of the deceased parent, such as a surviving spouse or parents, the children (and the children of their deceased siblings—that is, their nieces and nephews) will receive the entire estate.

Where to Go for More Help

Finding a Lawyer

Because marriage laws vary from state to state, the best and often only source of answers to specific questions about marriage law is a lawyer.

A good booklet on finding a lawyer is *The American Lawyer: When and How to Use One,* published by the American Bar Association (see inside front or back cover of this booklet for ordering information). The booklet discusses when a lawyer is needed, how to find and select one, and many other topics.

For a referral to a lawyer in a particular community, there are a variety of sources from which to choose. A number of referral services are operated by groups with distinct interests, such as the elderly or victims of domestic violence. Bar associations in most communities make referrals according to specific areas of law. State or local bar associations may also have information available on matters relating to family law. A phone directory will have contact information for bar associations.

A wide variety of programs around the country offer free or low-cost legal advice. People who need legal help, but are unable to pay for it, can contact a legal aid organization. The local bar association, county courthouse, or district attorney's office can suggest free or reduced cost legal services in a particular area. Many law schools also operate clinics offering free or low-cost legal counsel.

Information about the Law

A number of comprehensive books for the layperson include information

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on marriage and divorce law, along with many other legal topics. They are readily available in bookstores and public libraries. These books are general in nature and cannot detail every state's different approach to these areas of law. *Everybody's Guide to the Law* by Melvin Belli and Allen P. Wilkinson includes a chapter on marriage, divorce and the family. It was updated in 1987 and is published by Harcourt Brace Jovanovich, Inc. ($10.95). *The Reader's Digest Legal Question and Answer Book* discusses marriage, family, divorce and child custody issues. Published by Reader's Digest in 1988, this book is distributed by Random House and available in bookstores for $28.95.

The Reader's Digest also publishes the *Family Legal Guide* (1981; $24.95). This one-volume encyclopedia on law for the layperson has a special article on divorce and provides charts of state laws on parental liablilty, adoption, marriage, residence requirements and grounds for divorce and separation, and other areas relating to family law.

The Family Law Dictionary: Marriage, Divorce, Children and Living Together, by Robin D. Leonard and Stephen R. Elias, covers many topics related to the family, handled in alphabetical order. It was published in 1988 by the Nolo Press and sells for $13.95.

Adoption

Every state in the country has a state adoption officer. Generally these officials are located in the state capital. The state government information operator can provide assistance in locating this officer. For information about agency adoptions, contact the Child Welfare League of America, 440 1st St. N.W., Washington, DC 20001 (phone: 202-638-2952) or the National Committee on Adoption, 1930 17th Street N.W., Washington, DC 20009 (202-328-1200). Those interested in independent adoption should check with their state bar association to see if independent adoptions are legal in their state and if the bar association makes referrals to lawyers who handle independent adoption.

The Private Adoption Handbook takes the reader step-by-step through the legal, emotional and practical demands of adopting a child. It was written by Stanley B. Michelman and Meg Schneider, and published by Villard Books in 1989. It sells for $18.95.

Battered Spouses

Many communities now have shelters for battered spouses and their children. Information on these shelters is generally available from the police, churches, family law or conciliation courts, local newspapers or women's organizations. In addition, the National Coalition Against Domestic Violence operates a nationwide toll-free hotline—800-333-SAFE—which provides referral information on shelters and safe homes for domestic violence

victims in locations across the country. The toll-free number can also be used for information and support. Another source of information is the National Coalition Against Domestic Violence (P.O. Box 15127, Washington, DC 20003–0127; telephone 202-293-8860). The local or state chapter of the National Organization for Women should also be able to provide information to help battered spouses.

Child Support Enforcement

Information about specific enforcement procedures available under current state law is available from state and county enforcement agencies. The state government switchboard can direct parents to an appropriate officer with whom to discuss specific problems. Further information is available from the Office of Child Support Enforcement Reference Center, Washington, DC 20201, which can also direct parents to their state's enforcement officers. Furthermore, the Office of Child Support Enforcement (part of the U.S. Department of Health and Human Services in Washington, DC) will provide a free fact sheet and booklet entitled *Handbook on Child Support Enforcement.* The ordering address is: Handbook on Child Support Enforcement, Dept. 628-M, Pueblo, CO 81009.

Credit and Bankruptcy

Your Legal Guide to Consumer Credit, with a Special Section on Bankruptcy is available from the American Bar Association. Ordering information is located on the inside front and back covers of this booklet. This booklet also lists the many publications on credit and bankruptcy available without charge from the Federal Reserve and the Federal Trade Commission.

Divorce

There are many books specifically on divorce. James T. Friedman's *The Divorce Handbook Updated: Your Basic Guide to Divorce* (New York: Random House, 1984; $7.95) covers all major topics in a question and answer format. A recent book on divorce attempts to address both its emotional and legal complications. *Divorcing,* by Melvin Belli and Mel Krantzler, Jr., is a joint effort by a lawyer and a psychologist. It includes chapters on property settlement, custody, and other relevant legal issues. It was published in 1988 by St. Martin's Press and sells for $22.95.

Living Together

The Living Together Kit, by Toni Ihara and Ralph Warner, is a comprehensive book on the many legal aspects of living together outside of mar-

riage. It's published by Nolo Press (fifth edition, 1988), and is available at book stores for $17.95.

Mediation

The best source for family mediators is: Academy of Family Mediators, P.O. Box 10501, Eugene, OR 97440 (503-345-1205). They list family mediators in every state by training and experience.

Pensions

One resource for information on pensions, particularly as they are affected by the Employee Retirement Income Security Act (ERISA), is the U.S. Department of Labor. The appropriate office is Pension and Welfare Benefits Programs, Labor-Management Services Administration, U. S. Department of Labor, Washington, DC 20216.

The Pension Rights Center, a private organization designed to inform employees of their rights concerning pensions, also publishes booklets that explain pension-related topics. Write the Pension Rights Center, 1346 Connecticut Avenue N.W., Room 1019, Washington, DC 20036.

Social Security

A local Social Security Administration office can provide information and literature on benefits. A good worksheet for helping figure benefits is "Your New Social Security & Medicare Fact Sheet," which can be purchased for 75¢ each (minimum order $15) from BNA Books, 9435 Key West Avenue, Rockville, MD 20850–3397.

Taxes

The basic resource for information on federal income taxes is the Internal Revenue Service. The regional office for a particular area is listed in the phone book under U.S. Government. Another important resource is an accountant or lawyer specializing in tax matters.

Wills and Estate Planning

The American Bar Association has a brochure and a booklet on these topics. Single copies of both *Wills* (the brochure) and *Planning for Life and Death* (the booklet) are available free from Order Fulfillment, American Bar Association, 750 N. Lake Shore Drive, Chicago, IL 60611 (312-988-3071).

Women's Issues

The National Organization for Women's Legal Defense and Education Fund sells a *State by State Guide to Women's Legal Rights* that covers many aspects of family law. It is available for $12.95 (plus $2 postage) from NOW LDEF, P.O. Box 561, New York, NY 10013.

Other Sources of Help

Detailed information on sources of help for the family and the individual can be found in *The Help Book* by J. L. Barkas, published by Charles Scribners' Sons in 1979. Available in most libraries, this comprehensive book provides information on more than 5,000 programs, organizations, and agencies, including those specializing in adoption and foster care, child abuse, counselling, family planning, and parenting, to choose just a few of the many topics covered Even though some of the information is dated, this is still a useful resource.

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The "You and the Law Series" is one of the many programs and publications of the American Bar Association's Public Education Division. The Division's conferences, films, newsletters, and other outreach activities are designed to make the law more understandable to the American public. For more information about any Division activity, contact the Public Education Division, American Bar Association, 750 N. Lake Shore Drive, Chicago, IL 60611, (312) 988-5725.

These booklets are available for $2 each for one to nine copies, $1.50 apiece for ten to ninety-nine copies, and $1 apiece for one hundred or more copies. Please add $1 for postage and handling of orders under $5, $2.95 for postage and handling of orders over $5. Order from Order Fulfillment, American Bar Association, 750 N. Lake Shore Drive, Chicago, Illinois, 60611. Please specify product code number of the booklets you wish to order.